TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 224.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

ABE BEHYMER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

FILED [illegible], 1898.

(18,372.)

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a *Caption.*

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1901, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. ABE BEHYMER, Defendant in Error. } No. 1040.

Be it remembered that heretofore to wit, on the 14th day of March, 1901, a transcript of the record from the circuit court of the United States for the eastern district of Texas, was filed in the office of the clerk of said United States circuit court of appeals, for the fifth circuit, in the words and figures following, to wit:

1 *Order Convening Court, January Term, 1901.*

MONDAY, *January 7th*, 1901.

Be it remembered, that at a regular and stated term of the circuit court of the United States, for the eastern district of Texas, holding sessions at Tyler, Texas, on the first Monday, the same being January 7th, 1901.

Present: Hon. D. E. Bryant, United States district judge. M. C. McLemore, United States attorney. John Grant, United States marshal, and C. Dart, clerk of said court.

And the court being opened by order of the judge in due form, the following proceedings were had, to wit:

Plaintiff's Original Petition.

Filed in State Court April 6th, 1900.

Transcript Filed June 27th, 1900.

In the District Court, Gregg County, May Term, 1900.

THE STATE OF TEXAS, }
County of Gregg. }

To the Hon. J. G. Russell, judge of the district court of Gregg county, Texas:

The petition of Abe Behymer, hereinafter styled plaintiff, complaining of The Texas and Pacific Railway Company, hereinafter styled defendant, would most respectfully show:

First.

That Abe Behymer is a resident citizen of the county of Gregg and State of Texas, and that The Texas and Pacific Railway Company is a corporation created and existing by law and has a local agent at Longview in the county of Gregg, State of Texas, to wit: J. H. Hurst, who resides in said county of Gregg, State of Texas, and that said defendant company is now and was at the time of the grievances hereinafter alleged operating a line of railroad from Dallas, Texas, through the counties of Wood, Upshur and Gregg, on to Marshall and Texarkana.

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Second.

And plaintiff alleges that on the 7th day of February, A. D. 1899, he was in the employ of defendant's company as a brakeman on trains of defendant road and commonly known as freight trains and his duties as such brakeman *was* to assist in loading and unloading cars, switching cars, coupling and uncoupling cars, put on and off *breaks* (brakes), to put in and take out cars at stations, to see that *breaks* (brakes) were put on and off when at stations, and when cars were on sidings when it became necessary to move cars on sidings at stations to get on top of cars and run them to see that brakes were set if cars were to be stopped and to let off *breaks* (brakes) if cars were to be moved, and his duties required him to be on the top of freight cars either while in motion or standing still, to see the setting or letting off of brakes, and also to move about from one car to another to see that the brakes were properly set for the movement of the cars, or stopping of same and to do and perform all duties incident to his employment as a brakeman and was clearly under the orders, supervision and control of the *control of the* conductor in charge of the train who was a vice-principal over him, that the engineer in charge of the engine directed the movements of the train and has exclusive control of the speed of the train and directed the motive power of the train and also as to the speed and movements of the train, occupied the position of vice-principal of defendant company.

Third.

And plaintiff would further aver that on last-mentioned date he, as brakeman, went out on one of defendant's freight trains from Longview, going west to Dallas, the engine pulling the train being under the direction of an engineer, and said train having a conductor in charge, that said train left Longview about sunup on the date last mentioned and arrived at Big Sandy about 9 o'clock in the morning of said date at which point the conductor in charge directed some switching to be done, that there were a number of cars standing on the side track at that point, that defendant railroad at that point runs east and west, that the train was going west and that at Big Sandy it is upgrade going west and that the switch inclines downgrade east, and in order to prevent the cars on the side track from moving east the brakes have to be set, and that when the

train got to Big Sandy the conductor ordered some cars which were on the side track to be taken out to put in the train on the main track, which was done, when the conductor ordered that the remaining cars on the side track be
3 pushed further down east, and ordered your plaintiff to get on the top of said cars and run them and take off the brakes, and that in obedience to said order your plaintiff mounted the cars to take off the brakes so the cars could be pushed back, that the weather was very cold and that the top of the cars was encased with ice, sleet and snow, which fact was known to the engineer, who had charge of the engine during the switching, and plaintiff further alleges that the freight cars were provided with what *is* called foot-boards, on which the brakemen were to walk in passing along the top of the cars, and as a means of safety, as the top- of the cars are rounding, and without these foot-boards brakemen could not walk the cars with safety, and plaintiff further alleges that while doing switching at station, the brakemen in running the cars are required to move quickly and have no time to inspect the condition or safety of these cars of the foot-boards, and that on this morning the top- of the cars were slippery by reason of the sleet, ice and snow as above alleged, and plaintiff further alleges that after he had mounted the cars in obedience to the orders of the conductor and had taken off the brakes on two of the cars and had started back east on the top of the cars to unloose the brake of the cars east, and while walking along the foot-board provided and while exercising due and ordinary care and when about 10 feet from the east end of the car on which he was walking with his face east, the engineer in charge of the train in a negligent, careless manner backed his engine with great force against the cars upon which in the discharge of his duty plaintiff was riding, with such force and violence that by its force and violence — threw this plaintiff off his balance and in the effort to regain his balance the bottom of his pants was caught by a nail that through the negligence of defendant company had been permitted to come out of the foot-board and stood above the board about two inches, and jerked your plaintiff down and threw him between the cars while the same were in motion and he fell with great force on the drawhead and broke his leg between the knee and ankle, breaking both bones and causing a compound fracture of the bones and permanently and for life disabled him so that his capacity to earn money has been greatly impaired, and that he has suffered great physical pain and mental anguish.

Fourth.

And plaintiff further alleges that said injury was caused and was the proximate result of the negligence of the engineer in driving his engine with great and unnecessary force against the
4 car on which plaintiff was, and giving to it a violent and sudden jerk of such force as to throw the plaintiff off his balance.

Fifth.

And plaintiff further avers that defendant company had negligently allowed the foot-board on the top of the cars to become out of repair and by negligently allowing the nails or spikes which held and fastened the foot-board to the top of the car to come out and stand above the top of the foot-board, and thereby endangering the safety of the brakeman caused plaintiff's foot to be caught and to be jerked down and thrown between the cars, whereby he suffered the injuries complained of, as above set out and that said foot-board being out of repair contributed proximately to the injuries as aforesaid.

Sixth.

And plaintiff further alleges that said injuries were caused by the negligence and carelessness of the engineer in charge of the engine in violently, recklessly and unnecessarily *drive* with great force the engine against the cars with such force as to throw plaintiff forward and off his balance, and by the negligence of defendant company in negligently allowing the foot-board to become out of repair and remaining so, whereby his foot was caught by a nail or spike projecting above the foot-board he was jerked down between the cars, and that his injuries as aforesaid *was* the result of defendant'-, its servants' and agents' negligence, and not from any want of care on his part.

Seventh.

And plaintiff further alleges that previous to the 7th day of February, 1899, he had been in the employ of defendant company for over a year, and that — part of his consideration of employment defendant agreed and undertook in consideration of one dollar per month deducted from his wages to furnish him competent medical and surgical treatment and that defendant company made a like deduction from the wages and salaries of all its employés, servants, agents and officers, and in consideration thereof voluntarily assumed and undertook to treat and care for properly and in a skilful manner said employés in case of sickness or injury, and so undertook to treat plaintiff, and plaintiff further alleges that the amount of one dollar per month was withheld from this plaintiff and all other employés by defendant company whether they were willing or not, and that this amount was required to be paid and was withheld and deducted from each month'- payment by defendant company, and though the employés may have quit working for defendant company or was discharged or though the employé was never sick or injured, still he never got back any part that he paid into the fund which was denominated by defendant company, hospital fund, that your plaintiff nor no other employé had any supervision, control or management of said fund so collected, nor in the selection of surgeon-, doctors or nurses, but that all surgeons, doctors and nurses were under the management, control and supervision of defendant company, and said defendant had the exclusive management and control of all funds collected from each employé as afore-

said, and by reason of such fund collected and in consideration thereof the defendant company undertook, promised and agreed to treat and care for in a proper and skilful manner your plaintiff in case of injury, and plaintiff further alleges that defendant company had a hospital with surgeons, nurses and doctors provided at Marshall, Texas, to which place plaintiff was removed after his injuries as aforesaid, and defendant company then and there undertook and agreed to treat plaintiff in a proper and skilful manner, but plaintiff alleges that defendant company failed to treat him in a proper and skilful manner, but that its surgeons and doctors in charge of said hospital in a negligent and careless manner treated him in such an unskilful manner, failed to properly set his leg so that the bones failed to knit together, and now his foot hangs by the flesh and muscles and is useless, and the unskilful treatment has left his leg and foot an ugly deformity, and his foot hangs helpless and of no use to him, and in its present shape is worthless and of no service but a hindrance to locomotive and opportunity to work and make a living. And plaintiff further avers that both bones of his leg were broken by the fall from the car aforesaid, and that at the time of his injuries he was 22 years old, of robust constitution and had his leg been properly and skilfully treated, and the bones properly set they would have knit together and his leg would have become strong and useful to him again, but by the negligence and carelessness of defendant's surgeons in charge in not properly and skilfully treating his broken leg the bones failed to knit together and his foot now hangs dangling down, a mass of flesh, of no use to him, but a hindrance and preventive to work, that by said unskilful treatment he is rendered a helpless cripple for life, incapacitated from work, a constant sufferer, to his great damage.

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Eighth.

Plaintiff would further show that at the time of the injuries above alleged he was 22 years old, of robust constitution, a brakeman earning $75.00 per month, was in the line of promotion and had an expectancy of life of about 45 years, and that now by reason of his injuries all the result of defendant's negligence, he is permanently disabled for life, that he has not been able to do any work since he was injured and has suffered great physical pain and mental anguish, and that by reason of the injuries caused by the negligence of defendant company in leaving its cars out of repair as aforesaid and by reason of the negligence of the engineer as aforesaid and by reason of the unskilful treatment of defendant('s) surgeon as aforesaid he has suffered in the loss of time, in physical and mental suffering and in his injuries being permanent and lasting damages in the sum of thirty thousand dollars, for which he sues.

Ninth.

Premises considered, plaintiff prays that defendant be cited according to law by serving its agent at Longview, to wit: J. H. Hurst with citation to answer this petition, that he have judgment

for his damages and all costs of suit and for general and special relief in the premises and will ever pray.

JOHN B. HOWARD AND
F. J. McCORD,
Attorneys for Plaintiff.

(Indorsed:) No. 1247. Abe Behymer *vs.* The Texas & Pacific Railway Company. Plaintiff's original petition. Filed April 6th, 1900. W. R. Bass, district clerk, Gregg county, Texas.

Citation.

Filed 17th Day of April, 1900, in District Court of Gregg County, Texas.

Transcript Filed June 27th, 1900.

The State of Texas to the sheriff or any constable of Gregg county, Greeting:

You are hereby commanded to summon the Texas and Pacific Railway Company, J. H. Hurst, the local agent representing said railway company at Longview, in Gregg county, Texas, to be and appear before the honorable district court of Gregg county,
7 Texas, at the next regular term thereof, to be holden at the court-house in the town of Longview on the 14th day of May, 1900, then and there to answer the plaintiff's petition filed in a suit in said court on the 6th day of April, A. D. 1900, wherein Abe Behymer is plaintiff and The Texas & Pacific Railway Company is defendant. File number of said suit being No. 1247. The nature of the plaintiff's demand is as follows, to wit: Suit for the sum of thirty thousand dollars damages, personal injuries alleged to have been caused by the negligence of the defendant company at Big Sandy, on the 7th day of February, 1899, by the negligence of the defendant company in leaving its cars out of repair, and by reason of the negligence of the engineer of one of its trains driving and propelling engine and train of cars in a negligent manner, and by reason of the unskilful treatment of the defendant('s) surgeon at their hospital at Marshall, Texas. The plaintiff has suffered in the loss of time, physical pain and mental suffering, and in his injuries being permanent and lasting, damages in the sum of thirty thousand dollars, for which he sues, and for general and special relief, and costs of suit. All of which is more fully set out in the plaintiff's original petition now on file in this court, — which reference is hereby made.

And you will deliver to said defendant The Texas & Pacific Railway Company in person a true copy of this citation.

Herein fail not; and have you before said court, on the said day of the next term thereof, this writ, with your return indorsed thereon, showing how you have executed the same.

Given under my hand and seal of said court, at office in Longview, this the 16th day of April, A. D. 1900.

Attest:
[SEAL.]

W. R. BASS,
Clerk District Court, Gregg County, Texas.

Sheriff's Return.

Came to hand the 16th day of April, A. D. 1900, at 12 o'clock a. m., and executed the 17th day of April, A. D. 1900, by delivering to J. H. Hurst, of Longview, Texas, representing The Texas & Pacific Railway Company at Longview, Texas, the within-named defendant, in person, a true copy of this writ.

J. C. HOWARD,
Sheriff, Gregg County, Texas.

Fees.

Serving copy	$1.50
Mileage	
Total	$1.50

8 (Indorsed:) Filed No. 1,247. District court Gregg county, Texas, May term, 1900. Abe Behymer *vs.* The Texas & Pacific Railway Company. Citation. Issued 16th April, 1900. W. R. Bass, district clerk. Filed 17th day of April, 1900. W. R. Bass, clerk.

Plaintiff's First Amended Original Petition.

Filed 14th Day of May, 1900, in District Court, Gregg County, Texas.

Transcript Filed June 27th, 1900.

In the District Court of Gregg County, Texas, May Term, A. D. 1900.

THE STATE OF TEXAS, }
County of Gregg. }

Now comes Abe Behymer, plaintiff, leave of the court being first had and obtained, and files this his first original amended petition in lieu of his original petition, filed April 6th, 1900.

To the Hon. J. G. Russell, judge of said court:

The petition of Abe Behymer, hereinafter styled plaintiff, complaining of The Texas & Pacific Railway Company, hereinafter styled defendant, would most respectfully show.

First.

That Abe Behymer is a resident citizen of the county of Gregg, and the State of Texas, and that the Texas & Pacific Railway

Company is a corporation created and existing by law and has a local agent at Longview, in the county of Gregg, State of Texas, to wit: J. H. Hurst, who resides in said county of Gregg, State of Texas, and said defendant company is now and was at the time of the grievances hereinafter alleged, operating a line of railway from Dallas, Texas, through the counties of Wood, Upshur and Gregg on to Marshall and Texarkana.

Second.

And plaintiff alleges that on the 7th day of February, A. D. 1899, he was in the employ of the defendant's company as a brakeman on trains of the defendant's railway used and commonly known as freight trains, and his duties as such brakeman were to assist in loading and unloading cars, switching cars, coupling and uncoupling cars, to put on and take off brakes, and to put in
9 and take out cars at stations, and when cars were on siding when it became necessary to move said cars on siding at stations to get on the top of cars and run them to see that brakes were set if cars were to stop and to let off brakes if cars were to be moved, and his duties required him to be on the top of freight cars either while in motion or standing still, to see to the letting off or putting on brakes, and also to move about from one car to another to see that the brakes were properly set to the movement of the cars, and to do and perform all duties incident to his employment as brakeman, and was directly under the orders, supervision and control of the conductor in charge of the train who was a vice-principal over him and that the engineer in charge of the engine directed the movements of the train, had exclusive control of the speed of the train and directed the motive power of the train and also the speed and movements of the same and as such occupied the position as vice-principal to the defendant's company.

Third.

And plaintiff would further aver that on last-mentioned date he, as brakeman went out on one of defendant's freight trains from Longview Junction going west to Dallas, the engine pulling the train being under the direction of the engineer, and said train having a conductor in charge, that said train left Longview Junction about daylight on the date last mentioned and arrived at Big Sandy at about 8 o'clock on the morning on the said last-mentioned date, at which point the conductor in charge directed some switching to be done, that there were a number of cars standing on the side track at that point, that the defendant's railroad at that point runs east and west, that the train was going west and that at Big Sandy it is upgrade going west and that the switch inclines downgrade east and in order to prevent the cars on the side track from moving east the brakes have to be set and that when the train got to Big Sandy the conductor in charge ordered some cars which were on the side track to be moved out on the main line and also ordered your plaintiff to get on top of said cars and run them and to take off the brakes and

run them out. And plaintiff further alleges that the weather was very cold, the top of the cars being covered with sleet, snow and ice, and he objected to going upon the cars, when the conductor ordered him to go on the top of the cars, and stating that it was not dangerous, as the cars would be moved slowly and carefully. And your plaintiff further avers that he was inexperienced, was only 21 years old, have worked as brakeman but three months, have never been on cars covered with sleet, snow and ice before, and relying on the conductor's promise that the cars would be moved carefully and believing that there would be no danger if the cars were moved carefully and relying on the superior knowledge of said conductor, and in obedience to said order your plaintiff mounted the cars to take off the brakes so that they could be moved out, that the weather was very cold and that the tops of the cars were incased with ice, sleet and snow which made it dangerous to walk on, which fact was known to both the engineer and to the conductor in charge of the engine doing the switching; and plaintiff further alleges that the freight cars were provided with what is called foot-boards on which brakemen were to walk along the top of the cars and as a means of safety as the top- of the cars are rounding and without these foot-boards brakemen could not walk the cars with safety, and plaintiff further alleges that while doing switching at stations the brakemen in running the cars are required to move quickly and have no time to inspect the condition or safety of these cars or the foot-boards and on this morning the top- of the cars were slippery by reason of the sleet, snow and ice as above alleged, and plaintiff further alleges that after he mounted the cars in obedience to the conductor's orders and had taken off the brakes and while standing on the foot-board provided and while exercising due and ordinary care the engine moved the cars west to get out on the main line and when nearly all the cars were out on the main line the engineer in charge of the train slacked the speed of his train and then suddenly in a careless, negligent manner put on steam and without notice and warning to your plaintiff, gave a sudden and violent jerk to his train, all of which was negligence and unnecessary and that the force and violence of the sudden jerks threw plaintiff off his balance and in the effort to regain his balance the bottom of his pants was caught by a nail or spike that through the negligence of the defendant company had been permitted to come out of the foot-board and stood above the said foot-board about two inches which nail jerked your plaintiff down and threw him between the cars while same were in motion, and he fell with great force on the drawheads of the cars which fall broke his leg between the knee and ankle breaking both bones and causing a compound fracture of both bones, that in the fall his back was hurt and kidneys injured and that by reason of the injury to his leg, back and spine, kidneys, he has suffered and become injured for life and his injuries are permanent and lasting and *has* and will incapacitate him from earning a living, leaving him a helpless cripple for life, and that he

has suffered great physical pain and mental anguish and
11 that since the injuries aforesaid he has not been able to work and that his services were reasonably worth $125.00 per month.

And plaintiff further alleges that while he was on the top of said cars in the discharge of his duties in obedience to the orders of the conductor, the engineer in charge of the train on which plaintiff was riding, knowing that plaintiff was on top of said cars and knowing that the top of the cars was covered with ice, sleet and snow, handled said train in a reckless, negligent and unskilful manner, that he negligently moved said cars forward at a rapid speed and then suddenly stopped said cars, which caused the cars to drop back east some 8 feet to the extent of the slack and then to rebound back, which act of said engineer was dangerous to one on top of said cars in their condition, which caused your plaintiff to lose his balance as aforesaid and in the effort to regain his balance, the leg of his pants was caught by a nail or spike sticking up above the foot-board as above alleged, and he was jerked down and thrown between the cars and injured as aforesaid all through the negligence of said engineer in his handling of the train whereby he has sustained his damages as aforesaid. And plaintiff further alleges that the conductor knowing that he was on top of said cars, negligently failed to see to the movement of the train in a careful manner as he had promised to do, but allowed the engineer to move the train in a negligent and careless manner.

Fourth.

And plaintiff further alleges that said injuries were caused and were the approximate results of the negligence of the conductor in charge in ordering him in a dangerous place without protecting him, and of the engineer in giving the cars a violent sudden stop and jerk unknown to the plaintiff and of the negligence of the defendant's railway company in allowing the foot-boards of the car to become out of repair and negligently allowing the nail or spike which held and fastened the foot-board to the car to come out and stand up above the top of the foot-board and thereby endangering the safety of the brakeman which caused plaintiff's foot to be caught and he to be jerked down and thrown between the cars while in motion and injured, bruised and mangled as aforesaid, whereby he suffered the injuries complained of as above set out, and that said foot-board being out of repair contributed proximately to the injuries as aforesaid. And plaintiff further alleges that said injuries were caused by the negligence and carelessness of the conductor in order-
12 ing him in a dangerous place without protecting him, and of the engineer in charge of the engine in violently, recklessly and unnecessarily running, stopping and jerking the engine and causing the cars to jump back and forth with such force as to throw plaintiff off his balance and of defendant company in negligently allowing the foot-board to become out of repair and remaining so, whereby his foot was caught by a nail or spike projecting above the foot-board and he jerked down and between the cars, and that his

injuries as aforesaid resulted from the negligence of defendant, its servants and agents, and not from the want of care on his part.

And plaintiff would further show that at the time of the injuries as above alleged, he was 22 years old, of robust constitution, a brakeman earning $75.00 per month, was in the line of promotion and had an expectancy of life of about 45 years, and that now by reason of his injuries all the result of defendant's negligence, he is permanently disabled for life, that he has not been able to do any work since he was injured and has suffered great physical pain and mental anguish, all to his damage in the sum of $25,000.00, for which he sues and prays for judgment.

And plaintiff further alleges that previous to the 7th day of February, A. D. 1899, he had been in the employ of the defendant's company about one year, and that as part of his consideration of employment defendant agreed and undertook in consideration of 50 cents per month deducted from his wages to furnish him competent medical and surgical treatment in case of sickness or injuries, that defendant's company made a like deduction from the wages and salary of all of its employés, servants, agents and officers, and in consideration thereof, voluntarily assumed and undertook to treat and care for properly and in a skilful manner said employés in case of sickness or injury, and so undertook and agreed to treat plaintiff. And plaintiff further alleges that the amount of fifty cents per month was withheld from plaintiff and all other employés of the defendant company, whether they were willing or not, and that this amount was required to be paid and was withheld and deducted from each month's payment by defendant's company, and although the employé may have quit working for the defendant's company or was discharged or though the employé never was sick or injured, still he never received back any part that he paid into the fund which was denominated by the defendant's company "hospital fund." That your plaintiff nor any other employé had
13 any supervision, control or management of said fund so collected nor in the selection of surgeons, doctors or nurses, but that all surgeons, doctors and nurses were under the management, control and supervision of the defendant's company and said defendant had exclusive management and control of all funds collected from each employé as aforesaid, and by reason of such fund so collected and in consideration thereof the defendant's company undertook, promised and agreed to treat and care for in a proper and skilful manner your plaintiff in case of injury, and plaintiff further alleges that defendant's company had a hospital with surgeons, doctors and nurses provided at Marshall, Texas, to which place plaintiff was removed after his injuries as aforesaid, and defendant's company then and there undertook and agreed to treat plaintiff in a proper and skilful manner, but plaintiff alleges that defendant's company failed to treat him in a proper and skilful manner, but that its surgeons and doctors in charge of said hospital in a negligent and careless manner treated him in such an unskilful manner and failed to properly set his leg so that the bones of his leg failed to knit together, and now his foot hangs by the flesh and

muscles and is useless, and the unskilful treatment has left his leg and feet an ugly deformity and his foot hangs helpless and is of no use to himself and in its present shape is of no service, is a hindrance to locomotion and opportunity to work and make a living. And plaintiff further avers that both bones of his left leg were broken by the fall from the cars as aforesaid and that at the time of his injuries he was in good health, 22 years old, and of robust constitution and had his leg been properly and skilfully treated and the bones properly set, they might have knit together, and his leg become useful to him again, but by the negligence and carelessness of the surgeons and doctors in charge in not properly and skilfully treating his broken leg, the bones failed to knit together and his foot now hangs dangling down a mass of useless flesh and of no use to him, but a hindrance and prevention to work. That by said unskilful treatment he is rendered a helpless cripple for life, incapacitated from work and a constant sufferer, to his great damage in the further sum of $10,000.00.

Premises considered, plaintiff prays that defendant be cited according to law by serving its agent at Longview, to wit: J. H. Hurst, with citation to answer this petition, that he have judgment for the damages he has sustained in the loss of time, the injuries he has sustained to his leg, back and kidneys, his physical pain and mental suffering, and for the unskilful treatment at the
14 hospital as aforesaid, and all costs of suit and for general and special relief in the premises, and will ever pray.

JOHN B. HOWARD AND
F. J. McCORD,
Attorneys for Plaintiff, Abe Behymer.

(Indorsed:) No. 1247. Abe Behymer *vs.* The Texas & Pacific R'w'y Co. Plaintiff's first amended original petition. Filed the 14th day of May, 1900. W. R. Bass, clerk district court, Gregg county, Texas.

Contract of Attorney's Transfer of Judgment.

Filed in District Court, Gregg Co., Texas, April 16th, 1900.

In the District Court of Gregg County, Texas, May Term, A. D. 1900.

ABE BEHYMER
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 1247.

Whereas, I have employed John B. Howard and F. J. McCord, attorneys-at-law, to bring suit for me to recover damages against the Texas & Pacific Railway Company for the sum of thirty thousand dollars, and whereas, the said Howard and McCord have filed suit in the district court of Gregg county, Texas, for me for said amount against the said Texas & Pacific Railway Company, the file No. of

said suit being No. 1247; now in order to secure said attorneys in their fee, I hereby assign, transfer and turn over to them one-third of said cause of action, and do hereby transfer, assign and turn over and deed to them one-third of whatever judgment I may obtain against the said railway company. And in case said suit should be compromised before a final trial of same, then and in that event I agree to give them one-fifth of the amount of said compromise. It is expressly understood that I shall not compromise said suit without the consent of the aforesaid mentioned attorneys, and it is further agreed and understood that I retain the right to reject any and all offers of compromise of said railway company, and before any compromise shall operate as a release, money paid must be receipted for by myself and the above-named attorneys.

15 It is expressly agreed that the above-mentioned attorneys to pay the costs of suit, in case it is adjudged against me.

Witness my signature this the 16th day of April, A. D. 1900.

ABE BEHYMER.

(Indorsed:) Abe Behymer *vs.* The Texas & Pacific Railway Company. No. 1247. Contract of plaintiffs. Transfer of judgment. Filed 16th day of April, 1900. W. R. Bass, district clerk, Gregg county, Texas.

Petition for Removal.

Filed in State Court May 14th, 1900.

Transcript Filed June 27th, 1900.

In the District Court of Gregg County, Texas, Seventh Judicial District.

ABE BEHYMER
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 1247.

Petition for removal.

The petition of the Texas and Pacific Railway Company respectfully shows to the court:

First. That the Texas & Pacific Railway Company was, and is, a corporation, duly organized and existing under and by virtue of the laws of the United States, to wit: "An act to incorporate the Texas Pacific Railway Company, and to aid in the construction of its road, and for other purposes," approved March 3rd, 1891, and acts amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby, among other things, the name, style and title of said Texas Pacific Railway Company was changed to "The Texas and Pacific Railway Company."

Second. That the above-entitled action was commenced in the above-named court on the 6th day of April, 1900, and citation issuing therein was served upon this defendant on the 17th day of

April, 1900, which said citation is returnable on the second Monday in May, 1900, it being the 14th day of May, 1900, and this de-
16 fendant is not, and will not be required, by the laws of the State of Texas, or the rule of this court, to answer or plead to the petition of the plaintiff before the 15th day of May, 1900.

Third. That the matter in dispute in this case exceeds, exclusive of interest and cost, the sum or value of two thousand dollars, and this suit arises under the laws of the United States as hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff, Abe Behymer, to recover thirty thousand dollars damages for personal injuries alleged to have been caused at Big Sandy, Texas, on February 7th, 1899, by defendant's negligence in leaving its cars out of repair with a nail protruding from the footboard, and by reason of the negligence of the engineer of one of its trains driving an engine and train in a negligent manner and by reason of the unskilful treatment of plaintiff's injuries by defendant's surgeon at its hospital at Marshall, Texas. Plaintiff further alleges that he has from said causes suffered in loss of time, physical pain and mental suffering and from his injury being permanent and lasting, damages in the sum of $30,000.00, for which he sues, and for general and special relief and costs of suit. By an amended petition, filed May 14th, 1900, plaintiff claims $35,000.00 damages. And 1st amended original petition as appears from plaintiff's petition, which are referred to for a more particular statement of the cause of action. That this suit against this defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of this defendant, and under which it was incorporated, that is to say, the said acts of Congress of the United States approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railway Company, and to aid in the construction of its road and for other purposes," and acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874.

Fourth. That the above-entitled action is a civil suit arising under the laws of the United States of which the circuit court of the United States for the eastern district of Texas is given original jurisdiction by act of Congress approved March 3, 1887, to wit: An act entitled, *an act entitled* "An act to amend the act of Congress approved March 3, 1875, entitled An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and the acts of Congress approved August 13, 1888, entitled "An act to correct the en-
17 rollment of an act approved March 3, 1887, entitled An act to amend sections 1, 2, 3 and 10 of an act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes," approved March 3, 1875.

Your petitioner herewith presents and files a good and sufficient bond conditioned that it will enter and file in the circuit court of the United States for the eastern district of Texas, on the first day of its session, a copy of the record in this action, and for paying all

costs that may be awarded by said circuit court if said court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein. Your petitioner therefore prays the said court to accept said petition and bond, and to remove this cause to the circuit court of the United States for the eastern district of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC
RAILWAY COMPANY,
By DUNCAN & JONES, *Attorneys.*

THE STATE OF TEXAS, }
County of Gregg. }

John M. Duncan, being duly sworn, says that he is the agent and attorney of the Texas & Pacific Railway Company, being the local attorney of said company; representing it in above cause, that the said Texas and Pacific Railway Company is a corporation organized and existing under and by virtue of the United States; that he has read the foregoing petition and knows the contents thereof, and that the facts stated therein are true.

JOHN M. DUNCAN.

Sworn to and subscribed before me, this 14th day of May, 1900.

W. R. BASS,
[SEAL.] *District Clerk, Gregg County, Texas.*

(Indorsed:) No. 1247. Abe Behymer *vs.* The Texas & Pacific Railway Co. Petition for removal. Filed the 14th day of May, A. D. 1900. W. R. Bass, clerk district court, Gregg county, Texas.

18 *Bond for Removal.*

Filed in State Court May 14, 1900.

Transcript Filed June 27, 1900.

In the District Court of Gregg County, Texas, Seventh Judicial District.

ABE BEHYMER
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1247.

Know all men by these presents, that The Texas & Pacific Railway Company, as principal, and Edw. O. Tenison and C. R. Buddy, as sureties, are held and firmly bound unto Abe Behymer, plaintiff in the above-entitled cause, in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made, unto the said Abe Behymer, his heirs and assigns, we jointly and severally, bind ourselves, our successors, representatives, heirs and

assigns, firmly by these presents; yet upon these condition-; that, whereas, the said The Texas and Pacific Railway Company has filed its petition in the district court of Gregg county, for the removal of a certain cause therein pending, wherein Abe Behymer is plaintiff, and The Texas & Pacific Railway Company is defendant, said cause being numbered upon the docket of said court as No. 1247, to the circuit court of the United States for the eastern district of Texas.

Now, therefore, if the said The Texas & Pacific Railway Company shall enter in said circuit court of the United States for the eastern district of Texas, a copy of the record in said suit on the first day of the next session thereof, and shall pay all costs which may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the same was originally requisite in said cause, then this obligation shall be void, otherwise, of full force and effect.

Witness our hands and seals, this 3rd day of May, A. D. 1900.

THE TEXAS & PACIFIC
RAILWAY COMPANY,
By DUNCAN & JONES, *Attorneys.*
EDW. O. TENISON.
C. R. BUDDY.

Approved this the 14th day of May, 1900.

J. G. RUSSELL,
Judge District Court, Seventh Judicial District.

19 THE STATE OF TEXAS, }
County of Dallas. }

I, H. W. Jones, clerk of the district court in and for the — district of Dallas county, Texas, do hereby certify that the sureties on the within bond are, in my opinion, good and ample security for the amount therein specified, and that I would accept and approve said bond so signed if presented to me.

Given under my hand and seal of office at Dallas, Texas, this 3rd day of May, A. D. 1900.

H. W. JONES,
[SEAL.] *Clerk District Court, Dallas County, Texas.*

(Indorsed:) No. 1247. Abe Behymer *vs.* The Texas & Pacific Railway Company. Bond for removal. Filed the 14th day of May, A. D. 1900. W. R. Bass, clerk district court, Gregg county, Texas. This bond approved May 14th, 1900. W. R. Bass, clerk district court, Gregg county, Texas.

Order for Removal.

Filed June 27th, 1900.

ABE BEHYMER
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 1247.

MAY 15TH, A. D. 1900.

This cause coming on this day to be heard, upon the petition of the Texas & Pacific Railway Company, to remove same to the circuit court of the United States for the eastern district of Texas, at Tyler, Texas, said petition being heard by the court, and it appearing to the court that a good and sufficient bond has been filed, and that said petition shows proper grounds for removal, the prayer of said Texas & Pacific Railway Company is granted, and its bond approved, and this cause ordered removed to the circuit court of the United States for the eastern district of Texas, at Tyler, Texas, and the clerk of this court will make out a transcript of the record in this cause for the said district of Texas at Tyler, Texas.

20 *Certificate of Clerk, District Court, Gregg County, Texas.*

Filed June 27th, 1900.

THE STATE OF TEXAS, }
County of Gregg. }

I, W. R. Bass, clerk of the district court of Gregg county, Texas, do hereby certify that the foregoing transcript is a true and correct copy of all the papers and orders in the cause of Abe Behymer *vs.* The Texas & Pacific Railway Company.

Given under my hand and the seal of said court, at office in the city of Longview, Texas, this 20th day of June, A. D. 1900.

W. R. BASS,
[SEAL.] *District Clerk, Gregg County, Texas.*

(Indorsed:) No. 2405. Abe Behymer *vs.* The Texas & Pacific Railway Company. Transcript of record from Gregg county district court to United States circuit court for the eastern district of Texas, at Tyler, Texas. Filed June 27th, 1900. C. Dart, clerk, by D. W. Parish, deputy.

Defendant's Original Answer.

Filed September 3rd, 1900.

In the Circuit Court of the United States in and for the Eastern District of Texas, at Tyler.

ABE BEHYMER
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 2405.

Now comes the defendant, The Texas & Pacific Railway Company, and demurring to the first amended original petition of plaintiff herein filed, says the same is wholly insufficient in law, whereof it prays judgment.

Further and specially excepting to said petition, defendant demurs to and moves to strike out all those parts of plaintiff's petition which seeks to hold this defendant liable for damages by reason of unskilful or careless medical and surgical treatment of plaintiff's injury, and defendant says that such allegations show no liability against defendant on said account, whereof it prays judgment

21 Further, defendant denies all and singular the allegations in said petition contained, and says that it is not guilty of the aforesaid wrongs, injuries and trespasses therein alleged, and demanding strict proof of same, puts itself upon the country.

Further and specially answering to said petition, defendant says that if plaintiff has suffered any injuries and damages as alleged and claimed in his said petition, same occurred and arose solely through his own fault and negligence or through the negligence of his fellow-servants, and not through any fault, negligence or want of care of defendant or any of its agents or servants, and that plaintiff's negligence and want of care contributed to his original hurt and its injurious results, if any, to such a degree and extent that without such negligence and want of care plaintiff's injury and his present condition would not have occurred.

Defendant further alleges that plaintiff, at the time of his injury, had been in the service of defendant as a freight brakeman for several months and was familiar with the duties and responsibilities of trainmen, including brakemen; that plaintiff since infancy has been in a position to observe and become acquainted with the operation of trains, having been raised at Longview Junction, near the switch-yards, and his father an employé of this company in the yards for more than twenty years. That plaintiff was employed as a brakeman at his own special instance and request, and upon the request and recommendation of his father, George Behymer. That at the time of his employment, to wit: on the 4th day of October, 1898, said Abe Behymer agreed to and signed an application for a situation as brakeman, in which he specially assumed the risk of all such accidents as that by which he was injured, and by which he stated that he understood that no officer or

employé of the company was authorized to request or require him to use defective cars, tracks, machinery or appliances of any kind, and that when he did so, he assumed all risk of injury therefrom. Wherefore, defendant says that by reason of said application, defendant is estopped to claim as negligence of defendant that he was ordered by the conductor to go upon top of a car that was slippery with ice and had a protruding spike or nail in the foot-board.

Further, that the fact of the car being covered with ice and the fact of the protruding nail was as open and plain to plaintiff at the time he went upon the car as to any other employé on or connected with the train; that in fact, it was by reason of the circumstances better known to plaintiff than to any other one of such em-
22 ployés, and that if indeed the car was in such dangerous condition as claimed by him, he assumed all the risk by going upon the car and by *falling* (failing,) if he did *fall*, (fail) to notice and provide against its dangerous condition.

Defendant further alleges that it is not in fact true that the conductor or any other employé of the train was aware of any dangerous condition of the top of the car from which plaintiff fell, and it is a fact that neither the conductor nor any other employé made *and* (any) promises as to the movement of the train slowly or otherwise in order to or preceding plaintiff's going upon the car and falling off.

Defendant further says that plaintiff had been to and fro on top of the train walking the foot-boards continuously from the time the train was made up and started out until the time of his injury, and was thoroughly familiar with the condition of the tops of the cars, while the engineer was not at all familiar, by reason of his situation, with such condition, nor did the conductor have such means of knowledge of such condition as had plaintiff. Wherefore, defendant says that if plaintiff was injured as alleged by him, through the negligence of any one, it was through his own negligence and want of care.

Defendant further alleges that the car from which plaintiff fell was not a car of the Texas & Pacific Railway Company and was a car being operated only for a short distance and time in switching at Big Sandy; that same was a St. Louis Southwestern Railway Company car, standing on the switch of either that company or this defendant when the train upon which plaintiff was injured arrived at Big Sandy that day, and said car was not being used for the purpose of transporting it, but was necessarily included in a string of cars necessary to be moved back and forth in doing the necessary switching of said train at Big Sandy in setting in and taking out other cars; that the condition of the top of that car by reason of the circumstances was, at the time of plaintiff's injury, wholly unknown to the conductor and engineer of said train, and was known only to plaintiff, and that plaintiff assumed the risk of any condition of said car then and there apparent to him, *of* which by reasonable diligence might have been discovered by him. Defendant further says that it is not true in fact that there was a protruding spike on the foot-board or walkway on the top of said car; that

said car was then and there before its incorporation into said train, under the management and control of the St. Louis Southwestern Railway Company and its inspectors; that an inspection of said car immediately preceding did not disclose any such defective
23 condition, and that immediately afterwards, upon a careful inspection, no such defect appeared; that in truth and in fact, the existence of such protruding spike is a pure invention upon which to hang a chance for a recovery.

Defendant further alleges that the fracture of plaintiff's leg as claimed by him, at its origin did not present any serious difficulty as to treatment, but that same by proper medical and surgical treatment, and by proper care and obedience to instructions of medical attendants on the part of plaintiff, would have been cured so as to wholly restore the strength and usefulness of his limb; but that upon being taken to the hospital at Marshall, and after all proper care and attention was given him, his leg encased in plaster of Paris, and proper and skilful nursing, plaintiff became restless and refused to obey the advice and instructions of the surgeons and physicians in charge of his case, and wilfully from time to time, against the advice of said physicians, got up out of bed, walked around and left the hospital, traveling about over the country and endeavoring to use his limb; that he would not allow the dressing and bandages to remain upon it, but repeatedly tore them away so that it was impossible for his limb to heal or be restored to its former condition, and that the present condition of his leg was wholly caused by his own grossly negligent and careless conduct, for which defendant is in nowise responsible. That the surgeons in charge of his case at the hospital repeatedly requested him to allow them to do things that were necessary and proper in the treatment of his injury, and gave him repeated directions as to his conduct, which plaintiff wholly refused and ignored; that while in said hospital plaintiff had the best care and medical and surgical attention and nursing, and would have entirely recovered the use of his limb had he taken the treatment offered and conducted himself as a reasonably prudent man would have done. Defendant further denies any malpractice or want of proper treatment or care or attention on the part of the surgeons or other persons in charge of said hospital, in connection with plaintiff's injuries.

Further, defendant says that said hospital is supported by voluntary contributions from the employés of defendant company; but that no employés when injured or sick is compelled by contract or otherwise to enter said hospital or place himself in the hands of the surgeons and physicians there in charge, and that if plaintiff was in said hospital, it was by his own voluntary act; and if at any time he became dissatisfied with the treatment there received, he was at liberty to leave and place himself in the hands of
24 other physicians.

Defendant further says that it is a railway corporation engaged under the terms of its charter; is not responsible or liable for the acts or omissions of surgeons or physicians employed by it for attention to injured or sick employés, that it is simply a trustee of

the funds arising from the voluntary contributions of its employés, from which it pays such physicians and all the expenses of the conduct of said hospital as far as they will go; that the conduct of said hospital is in nowise within the powers or duties of defendant, but that it is a voluntary trustee for the conduct of such institution for the benefit of injured and sick employés, without any consideration or reward whatever and without profit to it; and that the fund arising from the contributions of its employés is strictly set apart to the expense of the operation of said hospital and the pay of its employés, and none of it used for any purposes of the railway company; but all strictly for the uses of its employés, and that defendant supplements the fund by its own voluntary contributions.

Wherefore, defendant says that by reason of all the aforesaid allegations, it is not liable for any damages in this case, and especially is it not liable for any damage which may have been inflicted, if any, by want of proper treatment in said hospital.

Wherefore defendant prays judgment and that it go hence with its costs.

DUNCAN & JONES,
Attorneys for Defendant.

(Indorsed:) No. 2405. U. S. circuit court, eastern district of Texas. Abe Behymer *vs.* Texas & Pacific Railway Company. Defendant's original answer. Filed Sept. 3rd, 1900. C. Dart, clerk, by D. W. Parish, deputy.

Plaintiff's First Supplemental Petition.

Filed January 7th, 1900.

In the Circuit Court of the United States in and for the Eastern District of Texas.

ABE BEHYMER
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 2405.

Now comes the plaintiff and files this his supplemental
25 petition in reply to the answer filed by defendant, and by way of exceptions to same, say-:

1st. That plaintiff excepts to that part of defendant's answer that charges that plaintiff's injury arose solely from and through the negligence of his fellow-servants, because the plaintiff is not bound by acts of fellow-servants in operating a train.

2nd. To all that part of the answer that alleges that the defect of the car might have been discovered by reasonable diligence on the part of plaintiff, because plaintiff is not bound to ascertain if cars are in safe condition, but has a right to assume that they are reasonably safe.

3rd. To all that part of defendant's answer that sets up as a defense that the defective car did not belong to defendant company

and was used only temporarily and was in a string of cars that had to be switched and that defendant did not intend to or did not use said car in the train, and was a car belonging to another road, because same presents no defense and because the duty rests upon defendant company to use reasonable care to see that all machinery or cars used by it are in a reasonably safe condition and of these exceptions this plaintiff prays judgment of the court.

F. J. McCORD AND
J. B. HOWARD,
Att'ys for Plaintiff.

And in reply to all that part of defendant's answer which sets up that this plaintiff did not take care of himself and by his own carelessness and negligence prevented the bones from knitting together plaintiff says, that he was not guilty of negligence and carelessness, but that he did all he could and complied with all directions as to his conduct and submitted to all requirements made at the hospital where he was, that the failure of the bones to knit together did not result from any want of care on his part, but that he did everything that he could to assist nature in the knitting of the bones and the healing of his wounds and that the failure of the bones to knit together did not result from any want of care or diligence on his part, wherefore he prays as in his original petition.

F. J. McCORD AND
J. B. HOWARD,
Attorneys for Plaintiff.

(Indorsed:) No. 2405. U. S. circuit court, eastern district of Texas. Abe Behymer *vs.* Texas & Pacific Railway Co. Plaintiff's 1st supplemental petition. Filed Jan'y 7th, 1900. C. Dart, clerk.

26 *Order.*

From the Minutes of January 7th, 1901.

ABE BEHYMER
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 2405.

Now comes on to be heard the defendant's demurrer to all that part of plaintiff's amended original petition claiming damages for unskilful treatment of plaintiff in the railroad hospital, and the plaintiff's counsel concede that the demurrer is well taken. It is thereupon ordered and adjudged that said demurrer be sustained and said allegation stricken out. And also came on to be heard plaintiff's exception to the defendant's answer and the argument of counsel having been heard, it is the opinion of the court that the law is with the defendant. It is therefore ordered and adjudged that said exceptions be and the same are hereby overruled, to all of which the plaintiff excepts.

Order.

From the Minutes of January 8th, 1901.

ABE BEHYMER
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 2405.

On this 8th day of January, 1901, this case was again regularly called, and the plaintiff, Abe Behymer, appeared, and by attorney, and the defendant, The Texas & Pacific Railway Company, appeared by Duncan and Jones, its attorneys, and both parties in open court announced ready for trial. Thereupon came a jury of twelve good and lawful men of the eastern district of Texas, to wit: W. D. Smith, R. J. Cook, W. L. Deaton, P. J. Brookshire, W. L. Avery, M. T. Lacy, W. C. Holt, S. A. Kendrick, J. D. Jordan, T. J. Billings, W. J. Free and J. M. Harris, who were duly elected, tried, empaneled and sworn to try the issues in this case, and the pleadings of both the plaintiff and defendant were read by the respective attorneys in the presence and hearing of the jury, and the trial of this case proceeded before the court and jury; but not being concluded, the further consideration of this case is postponed until tomorrow morning, and the jury permitted to disperse under instructions of the court.

27 *Order.*

From the Minutes of January 9th, 1901.

ABE BEHYMER
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 2405.

On this 9th day of January, 1900, this case was again regularly called, and again came all parties in this case, and came also the jury heretofore duly elected, tried, empanelled and sworn to try the issues herein, and the trial of the case proceeded before the court and jury, but not being concluded, the further consideration of this case is postponed until tomorrow, and the jury permitted to disperse under instructions of the court.

Order.

From the Minutes of January 10th, 1901.

ABE BEHYMER
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 2405.

On this day again came the parties to this suit by their attorneys, and the trial of the case was resumed before the court and jury, and thereupon the trial of the case proceeded, but not being concluded

the further consideration of the case was postponed until tomorrow, and the jury permitted to disperse under instructions from the court.

Judgment.

From the Minutes of January 11th, 1901.

JANUARY 11, 1901.

ABE BEHYMER
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. } No. 2405.

On this day again came the parties to this suit, by their attorneys, and thereupon the trial of the cause was resumed and
28 the trial concluded; and the jurors aforesaid duly elected, empaneled and sworn in this case, having heard the pleadings and the evidence and argument of counsel, and having received the charge of the court, retired to consider of their verdict. And thereafter on the same day the jurors aforesaid, returned into court, and in open court returned their verdict as follows:

"We the jury find for the plaintiff, Abe Behymer, in the sum of ten thousand dollars ($10,000) against The Texas and Pacific R. R. Co., defendant.
Jan'y 11th, 1901.

S. A. KENDRICK, *Foreman.*"

Wherefore it is considered by the court, and so ordered, adjudged and decreed that the plaintiff herein, Abe Behymer, do have and recover from the defendant herein, The Texas & Pacific Railway Company, the said sum of ten thousand dollars ($10,000.00) with interest thereon at the rate of six per cent. per annum from this date until paid, and also all costs about this suit incurred, and have execution therefor.

It is further ordered that execution may issue against each party for the costs by them respectively incurred.

Motion for a New Trial.

Filed Jan'y 12th, 1901.

In the Circuit Court of the United States for the Eastern District of Texas.

JANUARY 12TH, 1901.

ABE BEHYMER
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. }

Motion for new trial.

Now comes the defendant, The Texas & Pacific Railway Company, after verdict and judgment entered herein, and moves the court to

set aside said verdict and judgment and grant a new trial in this cause for the following reasons to wit:

I.

The court erred in its main charge to the jury in all those portions of said charge wherein they are told in substance in
29 regard to the degree of care required of defendant's agents and servants in moving the freight train from which plaintiff fell that they must have exercised that degree of care and caution that a person of ordinary prudence, under the same circumstances, would use under the circumstances, and that the question was, did the parties in charge of the train use ordinary care in handling it in so far as their duty required to avoid injuring any one; that is, did the operatives in charge of the train, in starting and stopping it, use the degree of care that a person of ordinary prudence would use in that business under the circumstances. This was error because the true question was and the true rule is, was the train of string of cars and locomotive, at the time plaintiff fell therefrom, being operated in the usual and ordinary way of handling freight trains and in switching cars, and was the jerk, bump or jar any greater than is ordinarily incident to the handling of freight cars and trains in switching. If the train and cars were so operated and plaintiff was injured thereby, then as a matter of law it was one of the risks he assumed upon taking employment as a brakeman, and he could not recover.

Again the charge limits the question to persons of ordinary prudence, when it should be as to whether engineers and conductors and trainmen ordinarily and usually handle trains in the way that one was handled at the time of the accident. The question of ordinary care and prudence does not arise until there was proof of the handling of the train, and starting it and stopping it in some unusual way, or unusual speed, or unusual jerks or bumps.

II.

The court erred in giving the law of contributory negligence in failing to instruct the jury that if plaintiff's negligence contributed in any degree to the accident and injury he cannot recover even though defendant be negligent.

III.

The court further erred in its main charge in failing to instruct the jury upon an issue made in the case by the pleadings, and upon which there was evidence, to wit: That if plaintiff knew the tops of the cars were covered with ice and were dangerous to brakemen going on top of same, prior to the time he went on top of the cars, then he was not bound to go into such place of danger, and it was incumbent upon him to use that high degree of care, if he had such knowledge or notice, for his safety commensurate with the known dangers to be encountered, and that if he failed to do so and
30 was injured he would be guilty of contributory negligence and could not recover.

IV.

Because the court erred in refusing to give defendant's special charge, number 2, as follows:

"Upon the law and the facts in this case, the plaintiff is not entitled to recover, and you are instructed to return a verdict for the defendant."

The evidence not showing any ground of liability under the law.

V.

Because the court erred in refusing to give defendant's special charge, number 2, as follows:

"You are further charged that if you believe from the evidence that by proper surgical treatment and attention, and by proper conduct and submission to treatment on the part of plaintiff, his broken leg could have been restored to soundness, then he would not be entitled to recover any damages against the defendant, even if the defendant was guilty of negligence, as defined in the general charge, beyond an amount sufficient to compensate him for loss of time, and mental and physical pain, during the time it would have required to restore his leg to such sound condition."

VI.

Because the court erred in refusing to give defendant's requested special charge No. 4, which charge is as follows:

"You are further charged that if you believe from the evidence that the cars from which plaintiff fell were covered with sleet and ice, and that that fact was known to plaintiff, and if plaintiff knew that walking upon the cars in that condition was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon top of the cars, and set or loose the brakes, he was not obliged to do so, and if he did so, with the knowledge that their condition made it dangerous to him in moving the cars, he will be held to have assumed the risk of all such dangers, and if his injuries were caused by such condition of the cars, and not by the negligence of those operating them, if any, he cannot recover for any injuries occasioned thereby," without interlined qualification as follows after the words "such condition of the cars and not by the negligence of those operating them, if any."

VII.

The court erred in refusing to give defendant's requested special charge number 8, as follows:

You are further charged that all the evidence in this case
31 concerning the nature of plaintiff's injury to his leg, and the proper and necessary treatment thereof, is to the effect that by proper surgical and medical treatment, his leg could be and could have been restored to a condition of usefulness and soundness.

It is further in evidence, without contradiction, that plaintiff was solicited by the surgeons in defendant's hospital, and by Dr. Saun.

ders, a surgeon at Fort Worth, to submit himself to such treatment, and that he was requested by Dr. Saunders, who testified that he is the local surgeon of defendant at Ft. Worth, to enter his hospital and receive their surgical and medical treatment for the restoration of his leg, and that plaintiff declined to take such surgical and medical treatment and attention; and it is further in evidence by the plaintiff himself, and without contradiction, that he has had no medical attention or care for his leg since he left the defendant's hospital at Marshall, and you are further instructed that the plaintiff cannot recover any damages he may have suffered by reason of the injury to his leg or for any permanent impairment of his leg, beyond an amount that would reasonably compensate him for the mental and physical suffering immediately caused by the injury to his leg, during the time in which it might have been restored by proper medical and surgical attention and treatment and for any other injuries, if any, he may have suffered from the original accident, then he could not recover damages for that unless you believe from the evidence, under the instructions heretofore given you, that the company, its agents or servants, were guilty of negligence as defined to you, in causing the original accident and injuries.

VIII.

Because the court erred in refusing to give defendant's requested special charge number 12, as follows:

"You are further charged that it is a matter of common knowledge that freight trains cannot be, and are not usually moved or stopped with the absence of jerk or jar characteristic of the movement of passenger trains, and that in moving freight trains there are necessarily jerks and jars, caused from the taking up and running out of what is called 'the slack,' and if you believe from the testimony that the plaintiff's injuries were caused by this fall from the car, caused by the taking up or running out of the slack, and that such was no greater in degree than is ordinarily incident to the starting and stopping of freight trains, and that plaintiff's fall was caused by this, in connection with the slippery character of the top of the car, then you are instructed that these were
32 risks assumed by the plaintiff, and he cannot recover for any injuries occasioned thereby."

IX.

The court erred in refusing to give defendant's requested special charge number 15, as follows:

You are further charged that if you believe the nail, if any, protruding from the running board was there because the car inspector did not properly inspect and repair the car, and plaintiff was injured thereby, then you are instructed that said car inspector was a fellow-servant of plaintiff, and he cannot recover.

X.

The court erred in refusing to give defendant's requested special charge number 10, as follows:

"You are further charged that plaintiff does not allege in his petition any negligence on the part of defendant company in allowing its cars to become coated with ice or sleet, and if you believe from the evidence that plaintiff was injured in consequence of slipping or falling by reason of the snow, ice or sleet, on top of the cars, then plaintiff cannot recover for any damages he may have received by reason of such fall."

Without qualifications, and in giving the same with the following qualifications: "Plaintiff asks, if this charge be given, that it be given with this qualification: provided his injuries were not caused by reason of the negligence, if any there was, of the employés operating the train."

XI.

The court erred in refusing to give defendant's requested special charge number 3, as follows:

"You are further charged that if you believe from the evidence that the present condition of plaintiff's leg was caused by improper treatment, or want of attention on the part of surgeons, then you are charged that the defendant is not liable for any damages caused by such condition, although you may believe from the evidence that defendant, its agents or servants were guilty of negligence in causing the injury as defined in the general charge."

Without qualifications, and in giving the same with the following qualifications: "Plaintiff asks that if this special charge be given, it be qualified or explained as follows:

"But in such case, though you may find that the plaintiff's injuries, as they now exist, may have been caused by failure to give him proper treatment or want of attention on the part of the surgeons, yet he can recover for all the injuries occasioned by the original ac-
33 cident, and all the damages that he may have suffered or may hereafter suffer as the direct and proximate result of his said original accident, as may be shown by the testimony, provided the defendant company is liable at all under the charge of the court."

XII.

The court erred in refusing to give defendant's requested special charges numbers 9 and 11, as follows:

"You are further charged that in taking employment, a brakeman assumes all risks necessarily incident to his employment, and if you should believe from the evidence in this case that plaintiff was injured by being exposed to the risks necessarily incident to his employment, he cannot recover."

"You are further charged that where one voluntarily enters into a contract of hiring with a railway company, and assumes all the risks and hazards ordinarily and usually incident to such employ-

ment, he will be presumed to have contracted with reference to such risks and hazards."

Without qualification, and in giving the same with the following qualification: "In connection with special charges numbers 9 and 11, of defendant, the plaintiff asks the court to instruct the jury: That while the *employ* (employé) assumes the risks ordinarily incident to his employment, he does not assume the risks incident to his employment which may be occasioned or caused by the negligence of the other employés operating the train."

XIII.

The verdict of the jury and judgment is grossly excessive in amount, the evidence clearly showing that plaintiff's damages, if any, accrued through gross and negligent conduct in leaving the hospital, and declining to submit himself to medical or surgical attention, and in being without surgical or other treatment for his leg from the time he left defendant's hospital up to the time of the trial, and in exposing himself and in using his leg in a negligent and careless manner, and in refusing to submit to a simple surgical operation for the restoration of his limb so that in fact the damages directly and proximately resulting from his hurt at the time of the accident to him could have amounted to only a small sum in comparison with the sum of ten thousand dollars found by the jury. Said verdict shows that the jury were influenced by passion and prejudice, and that the verdict was not returned upon a proper consideration of the facts and the law of the case.

XIV.

34 The verdict of the jury is against the law and the evidence in this: (1.) That all the evidence shows that at the time of the accident to plaintiff the string of cars from which he fell was being handled in the ordinary and usual mode of handling cars of freight trains, and the ordinary and usual way of starting and stopping trains and engines handling freight trains, and that the shock or jerk and the running out of the slack was no more than was ordinarily incident to such movement of freight trains, and that plaintiff's injuries and his fall were caused by such movements, and from no other cause except the ice on top of the car, which is not alleged nor insisted upon as a ground for damages.

XV.

The verdict of the jury is contrary to the law and the evidence further, in this, that all the expert testimony introduced in the case was to the effect, and without contradiction from the plaintiff, or by any expert, that defendant's leg, by proper care and treatment, could have been restored to its original useful state and shape; that the injury to his leg was not necessarily permanent, and even at the time of the trial a surgical operation, attended with very slight danger, would restore the limb to its normal and useful condition,

whereas the verdict of the jury shows that they found damages in favor of the plaintiff to compensate him for permanent impairment of his leg, when its condition, as it appeared at the trial, by all the proof, except his own evidence, was to the effect that it got in that condition through his own want of care, and his own failure to submit to surgical treatment.

XV-.

The court erred in refusing to give defendant's requested special charge number 13*b*, as follows:

"You are further charged that the uncontradicted evidence in this case is that the string of cars from which plaintiff fell was being, at the time of the accident, operated and stopped in the usual mode and manner of operating and stopping freight trains, if therefore you believe from the evidence that plaintiff's injuries, if any, were caused by the manner of operating and stopping the train or strings of cars, then plaintiff cannot recover in this case."

Wherefore defendant prays that said verdict and judgment be set aside, and a new trial awarded in said cause.

DUNCAN & JONES,
Attorneys for Defendant.

(Indorsed:) No. 2405. U. S. circuit court, eastern district of Texas. Abe Behymer *vs.* The Texas & Pacific R'y Co. Motion for a new trial. Filed January 12th, 1901. C. Dart, clerk.

35 *Order of Court Overruling Motion for New Trial.*

From the Minutes of January 16th, 1901.

In the Circuit Court of the United States in and for the Eastern District of Texas, at Tyler.

JANUARY 16TH, 1901.

ABE BEHYMER
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 2405.

On this day again came the parties to this suit by their attorneys, and thereupon came on to be heard defendant's motion for a new trial, and said motion having been heard, and the court being duly advised as to the law is of the opinion that the law is against the motion, and the same is hereby overruled, and it is so ordered, to which the defendant, by its attorneys, then and there in open court excepted and gave notice that the defendant would prosecute a writ of error, to the honorable, the circuit court of appeals of the United States, sitting at New Orleans, Louisiana.

Order Giving Defendant Forty Days to Present and File Bill of Exceptions.

From Minutes of January 16th, 1900.

In the Circuit Court of the United States in and for the Eastern District of Texas, at Tyler.

JANUARY 16TH, 1901.

ABE BEHYMER
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 2405.

On this day on application of the defendant in the above-entitled cause, the court allows the defendant forty (40) days from this day to prepare, present and file bill of exceptions in this cause, and this order is accordingly entered, and a bond in the meantime is waived by the plaintiff in open court, and execution stayed.

36 *Bill of Exceptions.*

Filed February 15th, 1901.

In the Circuit Court of the United States in and for the Eastern District of Texas, at Tyler, Texas.

Bill of exceptions.

ABE BEHYMER
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 2405.

Be it remembered, that on the trial of the above entitled and numbered cause, at the January term, 1901, of said court, the following proceedings were had:

The following are the facts and all the facts introduced in evidence on said trial.

ABE BEHYMER, plaintiff, after being duly sworn, testified as follows:

My name is Abe Behymer. I live at Longview. Will be 24 years old on July 19th. Have lived at Longview all my life; am a single man; my father and mother are living; was an employé of the Texas & Pacific Railway Company; think I went into the employment of that road on the 23rd day of October, 1899. Worked for them three months and over; think I made three trips on the extra; was freight brakeman; while braking I worked both ways out of Longview; from Longview to Texarkana and from Longview to Dallas and Fort Worth; Longview is a division; headquarters there. I was injured while in the employ of the Texas & Pacific Railway

Company on the 7th day of February; I believe it was 1899, I was mistaken about when I went to work; went to work in 1898 and it was February 7th, 1899, when I was injured. It was the 23rd of October, I believe, when I received notice that my application had been approved; that makes it a little over three months before I was injured that I had been working for the railroad. I never worked for the railroad before that, had never railroaded before that; had worked on a bridge gang once; don't know how long; about a year I guess. That was building railroad bridges. Made my first trip as a brakeman on Christmas Eve night. That was the first trip I ever
37 made over the road as brakeman, I did the duties of brakeman that night; broke on a freight train; it was what is called the chain-gang freight; a through freight, guess it was not a local. I was an extra man; when they first go into the employment they have to work extra until they find a vacancy for them on a regular train. I was injured at Big Sandy; left Longview about six o'clock that morning; the regular time for the train to leave was 5.55; it was Tuesday. I went out on a local freight. By a local freight I mean a train that unloads local freight along the line; distributes it out at stations; it is the business of that train to put out cars and take up cars along the road; they stop at nearly all the stations. It was a very cold morning that I left Longview; recollect the big freeze that year; I think it was but a few days before that. We got to Big Sandy about seven o'clock that morning, I think. It was cloudy, snowy and sleety weather. Alex. Key was the conductor on that train. Charles Smith was the engineer; J. E. Ferguson was the fireman; W. M. Seay and Mr. Stelson—Ben Stelson I believe his name is, were the other brakemen; there were three brakemen. I think it was about seven o'clock when we arrived at Big Sandy. The train stopped there. The Texas & Pacific crosses the St. Louis Southwestern or Cotton Belt R. R. right there at the depot at Big Sandy. I think the Texas & Pacific has but one switch at Big Sandy east of the Cotton Belt crossing. The west end of that switch-track comes into the main track right there at the Cotton Belt crossing, east of it about 6 or 8 feet. It is downgrade east there at Big Sandy; this train was going west. We unloaded some local freight after we got to Big Sandy. The conductor then told us we had some switching to do and told me to go and get up on the cars and let off the brakes of the cars on the side track; told me to get up there and let the brakes off. The depot is on the north side of the track. The switch that these cars were on, was on the opposite side of the track. The side track was full of cars, but we didn't get over eight or ten, something like that. The conductor told me to get up on the cars and let the brakes off from the crossing this way east; that we were going to pull out some cars. I told him it was dangerous and I didn't like to get up there on account of the ice, and he said What did you come out for if you didn't intend to do the work. If you are not going to do the work there are men in Longview who will. What did you come out for if you are not going to do the work. He says There are men

in Longview who will do the work if you are not going to do it.
Said it was not dangerous, that he would not move the cars
38 out very fast. I went upon the cars and found the brakes
set. If the brakes had not been set on those cars they would not stand there; they would have run back east; I let the brakes off so they could pull out. The engine run in on the side track to pull the cars out—the engine by itself; it went in on the west end of the switch. After the engine coupled onto the cars they pulled out pretty fast up above the switch, and when we got up to about clear it stopped suddenly and the slack run forward, and the cars rebounded and that threw me off my balance, and in trying to regain my balance the bottom of my pants was caught on a nail in the running board and it threw me between the cars. I fell on the drawheads. I was on the car next to the rear car; there was one car east of me. When I fell on the drawheads I got my leg broke and fell down between the cars, and I don't know really how I did get out from between the cars, but I got out and the cars did not get on me. My left leg was broken. (Witness was asked to pull up his pants and exhibit his leg to the jury, which he did.) I cannot walk on that foot any; the bones never did knit together there; it hurts a little to work my foot, but not much. I cannot bear any weight on that foot; can put it on the floor but can't put any weight on it; both bones were broken; one of them stuck out through the flesh at the time; about half way between the foot and the knee.

Both bones of the leg had been broken about midway between the knee and ankle. The bones had not united and when the foot was moved the bones at the place of the fracture moved and worked considerably. The leg was also crooked where broken. Plaintiff was also asked to stand upon his crutches and the broken leg appeared considerably shorter than the other.

The fall off the car is what broke my leg and caused that leg to be in that fix. I have not had any fall since then. Have stumbled several times but never have been hurt. I said I fell on the drawheads. I don't really know how I got off after I fell. They carried me to the depot at Big Sandy and put me in the sitting-room; stayed there from the time I was hurt until number 6, about eleven o'clock; was then carried to the hospital at Marshall—to the Texas & Pacific hospital. I left there on the 4th day of July, and if I had stayed there until the 7th it would have been five months. After I went down there my leg was put in a box, I believe they call it a fracture box, it stayed in there from the 7th to the 22nd; then it was put in plaster of Paris; it is a kind of stuff that looks a good deal like flour before they wet it. A kind of
cement; it becomes hard; I didn't take it off—couldn't
39 take it off; the surgeons took it off sometimes; when it was
on there two or three weeks they took it off and changed it. I am not able to do any kind of work, have not been since I received this injury. I walk with crutches; have never been able to go without them since the accident occurred. I think seventy dollars was the average of what I was getting when I got hurt; sometimes we would make more and sometimes not quite so much. Have

never been able to earn a dollar since. My father and mother live at Longview. I spoke about a nail catching my pants and jerking me down. I was riding those cars on the side track at the time. I had lost my balance before I struck this nail and was trying to regain it. The pants I had on at that time are here.

Q. What tore them that way?

A. That is where the doctor cut them.

Q. What is this?

A. That is where they were torn by the spike when I was jerked down. That is in the hind part of the pants; when they caught and jerked me down it tore that place, a torn place across the right leg, at the bottom about 3 inches long. I suffered a great deal from that injury. I suffer now at times. It hurts a little all the time, but not so very severe all the time. The top of the car has a board on top, a running board, for the brakeman to walk on; without that running board the top of the car is round. The running board is on the center of the top of the car; they are different widths; will average about eighteen inches wide; they are flat boards, one by six laid on the top; laid so that it makes that part of the top of the car level or flat. The duties of a brakeman required that he be on top of the cars for the purpose of setting brakes and letting them off; their duties require that they walk on top of the car; that is what the foot-board is put there for, for them to walk on. The foot-board runs the entire length of the car and generally projects over. The distance between two cars when they are coupled together is about two feet; the brakeman steps from one car to the other. The duties of a brakeman sometimes require that he shall walk on top of a car while it is in motion. The spike or nail that caught my pants was near the end of the car on the running or foot board; suppose it stuck up about two inches; it appeared to be a nail. The foot-board has nails in it; they do not stick up usually. I discovered that nail about a second or two before I was jerked down—a second or two before it caught my pants. Had not been on top of the car more than a minute or two at the time I was jerked down. I know that I had never been on that car before; had never seen the top of that car before I got upon it; did not know there was a spike in there; could not tell from my position on the ground that there was a spike up there. The brakes are fixed at the end of the car and you have to get up there with your hands and set them. Those are hand brakes. The brake is fastened to the end of the car; it is made of iron rods; there is a wheel on top of the brake-rod to assist in getting the brakes set up; it is operated by the turning of the wheel. There is something there by which a brake may be fastened and kept set; I forget what they call it; after a brake is set it can be fastened by putting this little catch in the cog and leaving it. This was the car next to the last car, east, back towards Longview. Big Sandy is west from Longview. I think there was something like ten cars that were moved; one flat car, I believe. Several of the brakes on those cars were set before I got up there for the purpose of holding the cars and keeping them from running out; it was downgrade east towards Longview. It was necessary

that the brakes on those cars should be let off or released before they pulled out of the switch; it was uphill out of there and you could not very well pull them out there with the brakes set. It was a part of my duty as brakeman on that train to release the brakes on those cars. Those cars were not any part of the train we carried to Big Sandy; they were in on the siding; they cut the engine off from the train and come on up to the switch and come into the switch and coupled onto these cars. The engine pulled the cars west after he coupled onto them; they were pulled out the main line; he moved the cars after I released the brakes; that was the usual and proper way of moving the cars, that is to move them after I had released the brakes; he carried those cars out of the siding about twelve or fourteen car-lengths I guess; carried them on to the main line; don't think all the cars were out of the switch at the time he stopped the cars; he made a quick stop; the sudden stop of the cars made the slack run up to the engine and jerked the cars on the rear end. That stop didn't have very much effect on me; it staggered me a little bit. I was on the car next to the last one at the time the cars were stopped; was standing up on the cars; on the foot-board; guess I was standing eight or ten feet from the east end of the car. When the engine stopped that had the effect of making the cars run forward on account of the slack, or making them bump against the engine; the engine jerked again and that kinder gave them another sudden jerk. I mean by that I suppose the engine was pulling them out of the siding. They were
41 not out of the siding and he opened the engine to pull out in the clear, and when he opened the engine it jerked the car again. The jerking of the cars threw me off my balance. The cars started the second time; he started them with a jerk; a sudden jerk; it wa a pretty good jerk; I mean it was a good heavy jerk. I don't know that I lost my balance entirely by reason of the first jerk of the cars; I think it staggered me.

Q. I will ask you again whether the first stopping of the cars caused you to lose your balance or not?

A. Yes sir.

The second jerk of the cars was made almost instantly; I had not recovered my balance at the time the second jerk was made.

The effect which a sudden stop of a train of cars has upon the cars in the train is to run the cars towards the engine; the slack in between them causes that; the slack is situated in the drawheads; there is some slack in the coupling between the cars. I say when the train is stopped suddenly the cars run forward. The other effect from a sudden stop, except the running forward of the cars is that they bound back at that place because it is downhill; suppose you would call that the rebound. The engineer of that train stopped those cars by a sudden stop. The cars run forward quick and sudden; just as quick as they could. The engineer had eight or ten cars attached to his engine at the time he made this stop and pulled forward. I think in a full train-load they haul generally sixteen to eighteen. Do not remember now what kind of couplings most of those cars had at that time. The catching of my pants upon that

nail had the effect to throw me down. I was staggering at the time the nail caught my pants; was staggering east back towards the end of the car. When it caught in my pants and I fell, it stopped my feet you know; I fell face down right towards the end of the car; right between the car I was on and the last car. The train was still moving at that time. I struck the drawhead, a part of the coupling between the cars. I fell on down between the track and between the rails; right between the cars, on the rail; no part of the train ran over me; the fall on the drawhead broke my leg; the drawhead is made of iron; don't know how far it is from the top of the car down to the drawheads; think it is something like eight feet; both of the bones in my leg were broken by the fall.

Q. What was the condition of your leg soon after the injury? Any of the bones of your leg visible?

A. Yes sir. I didn't see them; I don't know that they were.

42 I first discovered the spike or nail just a second or two before I fell. It was just about the time I lost my balance. I don't know exactly where that spike caught my clothing or pants; I know it was at the bottom of the pants. At the time I discovered that spike I was staggering around; I saw it just a second before I began to fall. I had noticed that spike just a second or two before I started to fall. I had released a brake on that car at the other end—the west end, that is the end back up towards the engine. That brake was set but it wasn't very tight. I had released four or five other brakes on the train besides that one, on the cars between me and the engine. I came from the engine down that way walking on top of the cars. I was sent to the hospital that same day—the railroad hospital of the Texas & Pacific railroad. Stayed in the hospital altogether about five months. Left there on the third day of July. When I first got there my leg was put in a fracture box. Dr. Eads and Dr. Taylor, did that. They are physicians at the hospital. Dr. Eads was the old gentleman who was sworn here this morning. Dr. Taylor was the house surgeon. My leg stayed in that fracture box until the 22nd; I was hurt on the 7th. It was then put in plaster of Paris. I was in bed at the time my leg was in this fracture box; continuously in bed. I don't know how they mixed plaster of Paris, but it was a kind of bandage they put around the leg; the broken part of my leg was encased in that cement; the cement started at the toes and came up to about here. They made my right leg rigid, I mean stiff. This part of my leg could not be bent while this plaster of Paris was around it. Dr. Taylor and Dr. Eads did that. That cast stayed on my leg about two weeks; it was then sawed off and they examined it and put a new cast on it. Dr. Taylor did that. They got the plaster of Paris off the limb by dragging a little saw along on it and cutting the cloth. The plaster is hard. That plaster stayed on my leg about two weeks. There was another one put on it; they changed it about every two weeks. I was in bed during that time. Before I got up at all I was in bed six weeks lacking two days. I got up on Sunday. My leg was still in plaster of Paris the day I got up. I just sat around the room; walking on crutches. That was done with the consent of the physicians in charge of the

hospital; they gave me the crutches to go on. I left the hospital and went home; on Easter Sunday was my first trip. I stayed at home two days and went back to the hospital and stayed two or three weeks. All together I stayed about five months in the hospital. It is about 23 miles from Longview to Marshall. I went on the train. My leg did not suffer any other injury, or
43 hurt, or accident of any kind that reduced it to that condition. Besides having my leg broken, I got my finger hurt and this other leg was bruised pretty badly, and my back was hurt; that was a temporary bruise; it healed up; the injury to my finger healed up in a short time; the lower part of my back was injured; I don't know what kind of a hurt or injury that was; there is a sign on my back; a good big place there now, a knot; my back hurt me for a good long while from that injury. Have not recovered entirely from the extent of that. It is better now than it was. It is a great deal better now than when it was first hurt; at times I suffer from it still. I don't know that it has improved any within the last six months. It was hurt in the fall. I don't know how it was, but something hurt me in the back. I don't know what it was that hurt me, but something hurt me in the fall. I can't walk without my crutches. I can't bear any weight on my foot at all. I was carpentering before I went to railroading.

Q. Have you any other profession outside of physical manual labor?

A. I took a course in book-keeping once. While I was in the hospital there was a statement presented to me to sign. Dr. Taylor presented it. It was three or four weeks after I had been in the hospital that it was presented to me. I was in bed when it was presented.

Q. Do you know what was in that statement?

(A.) At the time I went home from the hospital it was done with the permission of the physicians; with permission of Dr. Taylor.

Q. Who was there when you left? Did any one come after you? Any one from home come after you to carry you home?

A. I don't remember; I am not certain about that. Yes sir, my mother was over there, and I went back with her. I think it was something like 54 or 55 days after I had been in the hospital before I went home; it was on Easter Sunday.

Q. Now look at this plat. This is west and east, and north and south. Let this represent the Texas & Pacific railroad and this the Cotton Belt here. Now where is the siding or switch upon which these cars were that we are talking about? These heavy dots represents it?

A. The engineer was pulling out this way. That switch left the Texas & Pacific track about eight feet from the Cotton Belt crossing east of it. As to which is the easier handled a train of eight or ten cars or a full train of fifteen or eighteen cars, I suppose the
44 lighter the train the easier they are handled; the longer the train the harder they are to stop you know.

Cross-examination:

I suppose the ice was about a quarter of an inch thick on top of the cars that morning. It had been snowing and sleeting that morning after we came out of Longview; it was raining and freezing and about a quarter of an inch of ice was on top of the cars. This nail or spike that I speak of that was sticking up in the running board was about four or five feet from the end of the car, from the east end. I was going east at the time I stumbled. It was about eight or ten feet from the end of the car to where I first slipped. An ordinary freight car is about thirty or thirty-six feet long. I was nearer to the east end of the car than I was to the other end when I slipped. I fell right about the rail on the main track west of the road crossing; west of where the Cotton Belt crosses the Texas & Pacific; don't know how far west; couldn't say how far it is, but I think it is possibly 15 feet or possibly more, west of where the track of the Cotton Belt crosses the Texas & Pacific; west of the depot. The car next to the car I fell off of, the next one west was, a box car. I don't know what road it belonged to. I fell on top of a box car. The next car west was a box car; I think the third car was a box car. There was a flat car in the string. The next car east of the one I fell off of was a box car. I am sure of that; and I am sure as to the one next west being a box car. The next car west of the one I was on, was a box car, I am sure of that; it was not an oil-tank car. When I first started to get on the cars they were standing on the siding; there was no engine coupled onto them at that time. I got up on them towards the west end of the string; the first car that I got up on was a box car. I climbed up the ladder at the side. It was covered with ice; they were all covered with ice that morning. I got on at the front end. This car from which I fell was back from the west end of that string about eight or ten cars. I had gone over about six or seven cars to get to it. I had released some brakes. I don't know where the other brakemen were at that time. The other brakemen were Mr. Stelson and Mr. Seay. Mr. Stelson had charge of the engine and Mr. Seay had the list. They didn't do any work at that time on that train of cars that morning before I got hurt. I suppose they coupled the engine on. I had my back to them. I don't know where they were. Stelson and Seay did not do any work on the string of cars there before I got hurt. I am sure of that. I didn't see them do anything. They did nothing in connection with that string of cars only couple the engine on. I didn't see them do anything else. I released the brakes on the whole string as far as I had gone; some of them didn't have the brakes set on them. I had gotten pretty well over them in releasing the brakes when the engine coupled on. The engine moved immediately west when it coupled onto that string of cars. Then I passed on in the direction I was going on the moving cars and when I got to this car the train was still running. My understanding was that we were to cut these two rear cars off and I was to ride them down the main track and put them in our train. The car I fell off was one of the two rear cars

they were the two rear cars of that string. After I had gone about five cars they coupled onto the engine and moved west with the whole string. I was getting back to where I could let off the brakes on these cars and be there to ride them down when they cut them off. There was a steep grade there—upgrade west; the heaviest grade on the road, and that grade runs from the hill there back to Big Sandy creek. I thought these two rear cars were to go in our train and I was to ride them down and control them until they came back to our train, and it was my understanding they were to be put in our train. The rear car had not reached the crossing; that is why I think the engineer gave a jerk, when he saw he wasn't in the clear he opened the engine up. It was not my business to signal when he was in the clear. The man at the switch does that. That was Mr. Stelson. I did not see him there at the switch. After moving up to that point he come to a stop. And his going west and stopping, that would cause the slack to run up to the engine. When he would come to a stop the slack would be close up to the engine, and it being downgrade back it would take the slack out again. Now it didn't make any difference how the stop was made the cars would have a tendency to run up together in going up the grade, and when they would stop, the grade in the rear of the train would stretch the cars out again. They would run downhill until the slack was out.

Speaking of the grade there at Big Sandy, it is downhill east. It is a very heavy grade. I don't think it is necessary, in order to start a freight train standing there after the slack has run out of the train, to back the engine back and take up the slack until all the cars have run together and then start. I don't think that is the case in every case. I never saw passenger train at Big Sandy back back and take up the slack or run back the slack in order to get a start up that grade. I don't know that it is almost impossible, in a train of ten or fifteen or twenty cars to get the train moving unless
46 they back back and run the cars together so as to get the benefit of the slack. I had done very little railroading in the way of running trains at the time I was hurt. I think I had been out on four trips; that was my second trip over that part of the road, the road west of Longview. My first trip was on a local freight. I don't know how long before I was hurt that I made my first trip, but it was a short while. Just a short while before that; I think it was in February. I was working on the extra list, that is when they needed an extra man I was called out. A lot of men are always kept on the extra list. When the train pulled out of the siding on the main line it was going real fast. I could not tell you how fast it was going. I am not an expert; when the engine stopped the cars went on towards the engine, that is, they were taking up the slack, and when the slack run out the cars came back down the grade east. When the train stopped I had been over all the cars from the front end of the train back to this car. I had been over some seven or eight or nine cars. I don't pretend to be exact. I am just testifying from my impressions; I don't know that there were ten cars or eight cars. My recollection is that the rear car had not

cleared the switch. I was in the act of walking back towards the end of the car. The top of those cars were pretty slick that morning. When I speak of the foot-board, I mean what is generally called the running board. The whole tops of the cars and the running boards were pretty slick with ice. I don't think I was over four or five feet from the east end of the car. I suppose I was three or four feet from the end of the car when I first lost my balance and began to slip on the top of the car. I saw the nail about the time I began to stagger on top of the car. My foot slipped; I was already slipping on the ice when I saw the spike. The jerk of the cars is what started me, and I couldn't regain my balance because the jerk was too heavy. The slippery character of the car kept me from regaining my balance some. I don't think I got off the running board at all. I know I didn't. I am sure of that. It was the first stopping of the train and the running together of the cars that caused me to lose my balance. I lost my balance when they first stopped, and then when the cars went down the grade that helped me on and threw me down. I first staggered back when the train stopped. I staggered towards the other end of the car, and then when they went back it jerked me over the other way towards the end of the car. I think I would have had trouble in holding my balance on top of that car if it had not been for the ice; the jerk, I am confident, would have thrown me. I think it would have thrown me to the other car, I don't know whether I would have fallen
47 down on the ground or not. I mean the east car. I don't know how far those cars are apart when the slack runs out; I suppose about two feet or twenty-two inches. I never did measure them. That is as far apart as they can get when the slack runs out. I think the jerk was such as to have thrown me off the car; I don't know that it would have thrown me to the ground, but it probably would. I suppose that nail was sticking up an inch and a half. It was not in the middle of the running board; it was on the inside board on the south side, on the inside of the south board. There are three boards, and this nail was on the inside of the outside plank on the south side. I don't know how large those nails are that are used in the running boards. They must be pretty good long ones to go through the running board and that piece under them and then into the car. I don't know whether they go through that piece of cleat into the car or not; I don't know whether these cleats are nailed onto the cars or not. I don't know that those are eight-penny nails; they must have been larger than that. Just a second before I went to fall I saw that nail. My pants caught on the nail. I first knew my pants caught on the nail just as soon as it threw me down. The drawhead is what broke my leg; my leg struck the drawhead; did not fall on the ground between the cars; I fell out right about the end of the ties. My feet fell on the track; I did not go down head first; I just went down—I really don't know how I did go down, but I know that my leg struck the drawhead, and that is what broke my leg. I bounded or scrambled out clear of the track. The train was moving slow at that time; it was going west; they didn't go but a short distance. Yes, sir; I think the train was mov-

ing at the time I fell; I am confident it was moving. I don't know whether it was or not, but I think it was. If it was moving my impression is that it was going west. I fell down in between the cars, but got out in the clear. I think I first struck the ground right over the rail at the end of the ties. That conversation I had with the conductor was this: He told me they were going to pull all of those cars out from the siding, and for me to get up there and let off the brakes, and I told him I thought it was dangerous. I thought it was dangerous because there was ice on top of the cars. I had been on the cars before, that is, I had set the brakes on the caboose to hold the train. I had been out on top of the caboose. I set the brakes next to the caboose. I knew there was ice on top of the cars. I thought it was dangerous because it was slippery. I would have had no difficulty in maintaining my position, but I thought if the engine coupled onto them that if they didn't
48 handle it very carefully they would throw me down. Going on top of the cars were in the line of my duties as brakeman. What the conductor told me to do was a part of what it was my duty to do anyway. I told him I thought it was dangerous, and he said What did you come out for if you are not going to do the work. He says If you are not going to do the work, quit and we will get a man from Longview who will do it. He says I will see that they don't move out of here until you get them off, and I went on and let the brakes off. He said it was not dangerous. (These cars were not in Longview.) When we left Longview the cars in our train was covered with ice and sleet. I think that is all the conversation that passed between the conductor and myself about that. That morning when I come to go out on the train the conductor did not say anything to me about the condition of the cars, only he asked me just before we got to Gladewater what I would do if the train were to break in two and there was no one in the caboose but me, and I told him I would set the brakes on the caboose and stop the train and then go back and flag. I suppose that was a question he asked me to see whether I understood my duties or not. He did not say anything to me at Longview about the cars being covered with ice, and for me to be careful. I am sure about that. Mr. Alex. Key was the conductor. I don't know who picked me up after I fell; there were several. The train crew had several people from Big Sandy. I don't know what the man's name was who cut my pants' leg there; it was the doctor at Big Sandy. He split them up to the knee; the balance of it was cut off at Marshall. I don't know how long it had been before I first saw the torn place on the leg of my pants. It had been a good little bit after I got home. I was at the hospital nearly two months, and when I went home on Easter Sunday, it was a few days after that that I was looking over the pants, and found the torn place in them. That was the first time I discovered the torn place in the leg of my pants. I knew my pants were torn; I felt them tear when I was upon the car, but I did not know the extent of it. I wore the pants to Marshall. I did not tear that place in the leg of my pants. It was torn on that car that I was on; it was torn there on the car by that fall. I

know that because I felt it tear; I could not tell how big it was. I did not see it for about two months afterwards. They took the pants home from the hospital, and I did not see them any more for quite a while. I don't know whether that torn place was there in the leg of those pants as it is now at the time of the injury or not, but I think it was; it is the same now as it was when I first saw it.

49 There was no worn place on my pants about where that tear is that I know of. I don't think there was a worn place right where this torn place is. I can't see that those threads right in the middle there appear to be older and more worn than at other places. Sometimes a man wears the legs of his pants out there and don't wear it much at other places. I have no independent recollection about it; if they were worn there I didn't know it. I don't know that that indicates that there was some worn place there. It looks to me like it was torn.

Q. Does it look to you the same as it does out here towards the end. Those threads going up and down this way. Does the middle of this rent here in the pants, does that look the same to you as these places out here at either end of the torn place; in other words don't it look like there was a slight worn place there?

A. It looks like they were torn into right here. So far as knowing as to the extent of any torn place in my pants, or it being torn by something there at the time I was injured, I don't know anything about it except that I felt my pants tear. But the extent of the torn place I don't know, only I know it is in the same condition now as it was when I first observed it two months afterwards.

Q. I will ask you to observe the threads along here in the pants, along the cut portion of the other leg of the pants and see as to whether they appear to be of the same age as this place here torn by the nail, do they appear to have been done at the same time? Observe these black threads that stick out here, don't they appear to be fresher?

A. Yes, sir; they don't appear to be like the other. The ends of these black threads in this cut leg appear to be about the same. The ends of these threads in the cut of the leg of the pants appear to be somewhat faded; these appear to be black or fresh; they are the same threads; these threads appear to be worn there; they look like it. The balance of this cut in the leg of the pants was made at the hospital after I got to Marshall. I see those black threads or filling that sticks out there; they look pretty black. I see some little difference in the threads but not much. The threads at this place where you have just torn don't appear to be frayed or frazzled at the end very much.

I was taken to the hospital at Marshall that same day. Dr. Eads and Dr. Taylor dressed my limb there. Dr. Eads is the chief surgeon at the Marshall hospital. I think the doctor at Big Sandy kinder washed the blood off my leg; I don't think he put anything on it but a bandage; I was taken that day to the Marshall hospital.

50 I remained in the hospital six weeks, lacking two days, before I went out in the yard. It lacked just two days of being six weeks. I got out of the bed in six weeks; it was

several days after that before I got out in the yard because I couldn't get around on crutches very well and I was afraid to go down the steps. My foot has never been so that I could bear any more weight on it than I can now, since it was broken. They put my leg in what they called a fracture box, and kept it there about two weeks. They did what they called setting my leg when I got there. They called it that. It stayed in that fracture box until they changed it for a plaster of Paris cast. That was a solid casing around my leg to hold it stiff so that there would be no slipping in those joints, and about every two weeks they would examine my leg and dress it. The first time I left the hospital, my first trip away from the hospital was on Easter Sunday. I think it was on the 2nd day of April. That is a little less than three months from the time I was hurt. I went to Longview Junction on that trip. I walked on crutches. I had the plaster of Paris around my leg. Did not have anything to hold it up except the plaster of Paris. That extended above my knee; it extended about half way up my thigh. I think I staid down home two or three days. I think I went back to the hospital that Monday. I wore that plaster of Paris cast all the time, and had it on when I went back to the hospital. I staid at the hospital about a week that time. I then went back home and staid a few days. I wore that plaster of Paris cast that time. I just came down on one train and went back on the other that trip. I staid at the hospital then about two weeks before I went away again. I went back home, and staid three or four days. I then went back to the hospital, but don't know how long I remained that time. The last time I was at the hospital was on the third day of July. On the 3rd day of July I left the hospital and haven't been back since. I was not discharged from the hospital. I did not have any talk with Mr. Eads about my leg. He did not talk with me about it. I did not have a plaster of Paris cast on my leg when I finally left the hospital. I kept a bandage on it myself. I had no dressing on it at the time I left the hospital except a dressing that I had put on it myself. Dr. Taylor took the plaster of Paris cast off; it was not renewed, he said he would leave it off. I did not say anything to Dr. Eads about leaving the hospital. I was not finally discharged as cured or anything of that kind; they said I was getting along all right the last talk I had with Dr. Taylor. That was some time before I left the hospital. He said my leg would get all right; that it needed time. When I left the hospital finally I went to Longview. I showed several other doctors my limb. I
51 showed it to Dr. Northcut, Dr. Lawrence and Dr. Terry. I believe they are the only ones. Mr. Campbell asked me to go back to the Marshall hospital. Mr. Campbell asked me to go to Fort Worth and let Dr. Saunders examine my leg. I went to Fort Worth during the Dallas fair a year ago. I believe Mr. Campbell did go upon the same train I did. He gave me transportation there, and went with me to see Dr. Bacon Saunders at Fort Worth. He examined my leg. I don't think Dr. Saunders said anything to me about my leg. He asked me how long it had been done, and asked me a few

questions, but he didn't say anything about curing me. He told Mr. Campbell he could perform an operation on it, but couldn't say what would be the results. He told Mr. Campbell that in my presence. He didn't say he could perform an operation and restore my leg; he said he could put these bones in condition but didn't know whether they would unite or not. He did not advise anything. He and Mr. Campbell did not submit a proposition to me for me to go in his hospital there and have my leg treated. If Mr. Campbell had told me he wanted me to go in that hospital I would certainly have gone. Dr. Saunders did not tell me that he could perform an operation and set my leg which would likely restore it, and did not advise me to go in his hospital. He said he had a hospital there, a nice place, and he would be glad for me to come around; he said he would be glad for me to come around. He did not advise me that without any danger to my life he could give me a nice place in his hospital and perform an operation on my leg and unite these bones that would restore my leg to a sound condition as it was before; and I did not take the matter under advisement and tell him I would write him whether I would come back there or not. I had not brought suit at that time; I didn't bring suit until the last May term of the court. I think I had two conversations with Dr. Terry about my leg. I went up to his office to show him my leg. He didn't tell me much about the probability of restoring it; he was so drunk he couldn't put the bandage back on it. I have known Dr. Terry since we were boys. I think he is about twenty-five or twenty-six years old.

Q. The reason you say he was drunk is that you told him you were not going to have anything done to your leg, but was going to save it and show it to a jury?

A. No, sir; he said he thought my leg could be operated on, but he wasn't prepared with the proper instruments. I did not tell him that I was not going to have it done. He asked me if I would not go to New Orleans to the Charity hospital, and I told him I
52 was jam up on hospitals. I don't know whether the hospital he spoke of was the Tulane University medical school or not. If I told him that I was going to save my leg and show it to a jury I don't remember anything about it. I have been living in Longview around railroads a little over twenty-three years. I was a little over twenty-one years old at the time I was employed by the Texas & Pacific Railway Company. I had never had any experience before that in running cars or in braking on cars before that. I have passed by the station several times, and suppose I was acquainted in a general way with the movement of trains. I was raised right there at Longview Junction. My father is working for the railway now in the capacity of car repairer. He has been working for the Texas & Pacific Railway Company twelve or fourteen years; he went to work for them in 1886. Before that time he was in the sawmill business. I made an application for employment. I was not requested by the company to take employment; I made a regular application for employment; I wanted to go to work on the train. My father consented to it. Mr. Foster told me if I would get an affidavit or something from a notary public that I was twenty-one years

old, and that my parents had no objection to my accepting a position as brakeman, he would give me a blank application. I don't remember the date I made the application, but it was in October, 1898, some time I think it was about the 4th of October. I was born in 1877, on the 19th day of July. That is my signature ; that is the application for employment that I made; it was witnessed by W. E. Johnson. I filled out the blanks myself; the blanks in the application are filled out in my handwriting.

This don't look much like my handwriting ; I don't know whether it is or not. I don't think I wrote this. This is the statement of the doctor. Dr. Taylor wrote this. I am not sure whether that is my signature or not; it don't look very much like my handwriting. I couldn't say whether that is my handwriting or not. I made a statement to Dr. Taylor. I signed a statement to Dr. Taylor. I signed a statement that Dr. Taylor submitted to me, but he filled out the blanks. That is my signature ; I think that is mine ; I signed a statement to Dr. Taylor. I don't say that it is not my signature, but I am not sure that it is. This afterwards proved to be a copy and not the original statement, and the original was afterwards introduced. I don't remember the date that statement was made. I think I had been in the hospital three or four weeks when I made it.

53 This statement bears date 2–25 1899, that would be February 25th, 1899, something less than three or four weeks after I was hurt.

I was picked up and carried to the depot there at Big Sandy by the trainmen and others, and remained there until number 6 came in, about three hours and a half. I don't think I made any statement to those parties who picked me up and carried me into the depot as to how I came to get hurt. I don't remember whether I did or not. I know Mr. Hamlet, the car inspector at Big Sandy. I did not know his name at that time, but knew his face. Don't know whether Mr. Hamlet made a report of that accident by wire or not. I think it is the duty of all railroad employés, conductors, brakemen and engineers, or car inspectors to make accident reports of any accident that happens, to headquarters. I don't know whether it is or not, but I think it is. Mr. Hamlet did not say anything to me, the same day I was hurt, about the cause of my getting hurt. I did not state to any of the parties there at the time, before I was carried to Marshall, to the doctor, Hamlet or Key, or any one of those people who were there, anything about the cause of my getting hurt. If I made any such statement I don't remember it. If I did make any such statement I think I would know something about it. I don't remember telling Mr. Hamlet, the car inspector who wanting to make a report, asked me how I came to get hurt, that I slipped on top of the car. I don't think I told him that it was on account of the ice on top of the car that I slipped and fell. I don't remember telling any one there, before I was carried to Marshall, or in the presence of any one there, that any nail or spike had anything to do with my falling off the car. The doctor came there to see me ; there were several in the depot when the doctor was waiting on me. I don't remember who they were. I suppose

the engineer and fireman and brakeman were there, because they were the ones who brought me in. I don't know how long they stayed. I don't remember when was the first time I ever said anything to any one about a nail having caught my pants leg. I don't remember when was the first time I ever told any one about the nail. I don't remember who I did tell first. I don't remember the first time I ever mentioned it; I told my attorneys about it. I don't know how long before that it was that I told any one else about it; I told several. I did not tell Dr. Terry about it that I know of. I do not know that I did not. I do not know that I told any one before I brought this suit, outside of my attorneys, that there was a nail in the running board that caught the bottom of my pants.

54 I do not know that I did not. I think I told my father. I think I told my mother and father both. I do not know how soon after the accident that I told them anything about it, but I think I told them. I know I told them, but I don't remember when. I do not remember ever telling any one else. I think I told Dr. Taylor in that statement that it was through no negligence of the railroad company that I got hurt. I never made any other statement besides that that I remember of. If I made a written statement to Dr. Dial I don't remember it. That is the name of the Big Sandy doctor. I do not think I made any statement to him. Dr. Taylor told me that it was the duty of all the surgeons to make reports of all the cases they examine, as to the facts and circumstances of the accident. I do not know that it is, but Dr. Taylor told me it was.

That is my signature. The name of H. C. Dial is signed to it as a witness. It is headed local surgeon's report, Texas & Pacific Railway Company. I signed that statement; that is my signature. It is dated February 7th, 1899. When I went to work for the railroad company my father signed a statement that I was twenty-one years old, and consented for me to go to work for the railroad company. If I remember right, it read that this is to certify that my son, Abe Behymer, is twenty-one years of age, and I have no objection to his accepting a position as brakeman. I think that is the way it read. I think I wrote it myself and gave it to him, and he went to a notary public and acknowledged it. I think I wrote the statement myself.

I do not remember how often I talked to Dr. Terry about my injuries. I went up to his office one time to consult him about my injuries. I went up to Dr. Northcut's office once, and his and Dr. Terry's offices are right together. They did not examine me together. I had other sickness while I was in the hospital at Marshall; I had the la grippe. I did not have a spell of *malerial* (malarial) fever while I was there; I was treated for the la grippe while I was there. That la grippe lasted me about a week; I had fever about a week; it was while I was in bed there, before I got up at all. I had no malarial attack. They did not do anything for the injury I speak of in my back; I could not get then (them) to do anything for that. I was complaining of my back. My fingers were mashed. That was not treated; my right leg was bruised above the knee; they were just bruised and got well without treatment.

55 Redirect examination:

After I was injured at Big Sandy, I was first moved into the sitting-room of the depot there at Big Sandy. I was placed on a grain door of a car; nothing was put on the door; was just carried in on the wooden door. I remained there about three hours and a half. I suppose it was a half hour after I got hurt before the doctor got there. When the doctor got there he went to work on my leg; he did not put anything under me; he did not get any mattress or anything of that kind to put me on, *not* (nor) did he get any cover for me. It was cold weather. Some one else came and rendered me some assistance; some people there at Big Sandy brought a pillow over there; it was a gentleman. The doctor did not do anything of that kind for me. Dr. Dial gave me an opiate or something of that kind. I do not remember to have signed a written statement to Dr. Dial while I was in the depot there. I was suffering all the time, it was very severe suffering. I went to Dr. Terry's office one time. He was going to New Orleans to take a course of lectures, but he didn't go. He was drunk at the time I was in his office. I had a dressing on my leg at that time, and he took it off; he did not put it back on; he tried to put it on. I have seen Dr. Terry drunk two or three times in my life. I suppose he was about twenty-four years old when he gave me this advice; he is connected with the railroad company as assistant local surgeon. Dr. Northcut is the local surgeon. I consulted with Dr. Northcut once; he asked me how I was getting along, and I told him he could just look at the leg and see; that was at Reynolds & Smullin's drug store there in Longview. He took something off my leg; that was while I was staying at the hospital; I had a kind of a chalk cast on the leg that Dr. Taylor put on the day before I left the hospital, and he told me that if it hurt me to go to Dr. Northcut and have him take it off. I got home the next morning and about four o'clock it got to hurting me so bad I went up there and got Dr. Northcut to take it off. He did not put it back on again, said it did not need anything. I went back to the hospital the next morning after Dr. Northcut took this cast off; I told Dr. Taylor what had been done; he did not do anything for my leg; he did not put that character of dressing back on it himself. I had put a bandage on it. When Dr. Taylor dressed my leg and changed the plaster of Paris on it I told him I thought it looked crooked. He kinder sneered at it and said he had sense
56 enough to know when a leg was set properly; that I had read almanacs until I thought I knew. After the leg was put back in plaster of Paris it looked like it does now, crooked. Several times Dr. Taylor was drunk while dressing my leg.

MRS. N. M. BEHYMER, witness for the plaintiff, after being duly sworn, testified as follows:

I live in Longview, Texas, and have lived there forty-three years. Abe Behymer is my son; he is twenty-three years old now. I recollect the time he got hurt. The first time I saw him after he got hurt was at Longview when I got in the baggage car where he was;

I went with him to Marshall. I know this pair of pants. I first saw the pants after Abe was hurt when I got to the car where he was I went to Marshall with him but did not bring the pants back home with me the first trip. I brought them back the second trip I made to Marshall. I went down with him when he went and *staid* (stayed) with him the next day and *come* (came) home, and then went back again and brought the pants home with me when I *come* (came) home that time. They have been in my possession ever since. I first discovered that torn place there the morning that I went down to Marshall with him, on the train. There has been no change in the torn place; it was then just like it is now. When he was first hurt I went down to see him every other day, and then I got to going every three days. I recollect the first time he *come* (came) home. Dr. Taylor said he could come home. He *come* (came) down on number 5 in the evening, and *staid* (stayed) about two days. I think about two days was the longest he ever *staid* (stayed) at home when he would come home. He has always been a sober, industrious boy; always been a good boy. He always had good health before he was hurt; was a vigorous, strong, young man; I never saw him sick but once in my life. He has been with me ever since he has been hurt, and I go with him everywhere he goes. He cannot even hand himself a chair to sit in; I have to wait on him all the time.

Cross-examination:

I did not go with him to Fort Worth. He also went to Dallas without me. Once and awhile he would walk down to the junction. I live about three-quarters of a mile from Longview town; Abe has been up in town since he was hurt; once and awhile he goes up there. I go with him around Longview. Sometimes he goes by himself, but I nearly always go with him. He has had to
57 walk on his crutches since he has been home from the hospital. I do not know how often he has been uptown since he has been home from the hospital. I called his attention to that torn place in his pants that morning doing down on the train. He left my house that night. That place was torn when he was hurt. I have never been a witness before. I do not know of my own knowledge when it was torn; I guess it was torn then I suppose. It was not torn when he left home, and it was torn when I saw him next, and I called his attention to it. I showed him where the pants were torn that morning going down to Marshall; he talked to me about the accident, and I discovered the torn place in his pants and showed it to him that morning. I did not see anything on the other leg of the pants except blood. I did not see any cut place in the leg of the pants. I think Dr. Taylor cut it. It was not cut at Big Sandy; Dr. Taylor cut it at Marshall. I did not see any cut place at all in the leg of the pants that morning when I saw him. I examined him and saw the condition his leg and clothing were in. If there was any cut place in the leg of the pants I did not see it. That is the left leg of the pants. I think it was his right leg that was broken.

I went down with him on number six, and the next day I came back home on number one, and the next day I went back on number six, and when I came back on number five I brought the pants with me. That was only two or three days after he went to Marshall. I did not look at them dress his leg, but I was there at the hospital. They took off his pants, and he did not have them on any more. I did not take any clothing down there to him; he kept on his underwear until he got up, or they furnished clothing for him, and when he got up he sent for clothes. That was the first clothes I took him. I have had lots of experience in dealing with torn clothes and patching. I do not know whether this looks like a fresh tear or an old one. I can't see well enough to tell whether it looks like a fresh or an old one. I wear spectacles and have not mine with me. Ordinarily you can tell whether a tear is a fresh one or an old one, but I can't tell this because I have not got my glasses. That is on the right leg; I know it was on the leg that was not hurt. The left leg is the one that was hurt. I don't think this leg of the pants was cut when I saw it that morning in the car; if it was I didn't see it. My opportunities for seeing it were just as good for seeing this other place and looks like I ought to have seen it. This place was as large then as it is now. My eyesight is not good enough to tell anything about how the threads look, or anything of that kind. That is a pair of jeans pants. George Behymer, my husband, is not here. Abe was lying down on a cot in the car, and I sat along by the side of him. I reckon he was about middle ways of the car, he was in the baggage car. Abe told me that morning how that torn place came to be there. I called his attention to it. He told me that he caught it on a spike or big nail sticking up out of the running board, or foot-board, on top of the car. He told me that there that morning. He was all right at the time so far as his mind was concerned; was perfectly clear; did not seem like he was hurt to me; looked perfectly sane and sensible, just as sane as he always looked. He did not call my attention to it; I was looking to see what was the matter with him; when I got the telegram that he was hurt I thought he was hurt worse than he was. I noticed that torn place in the leg of his pants, and he told me that he caught it on a spike or a nail; he told me that that morning. My daughter was present also; she is not here. No one else besides her was present at all. I know no one else heard that that I know of. I went on to Marshall with him. He did not make any statement to me as to whether he was hurt through the negligence of the railroad company or any one else. This place in his pants was torn that morning some time after he went out. It was all right when he left home; I noticed when he left home that it wasn't torn. There was nothing worn along there that I noticed they were a good pair of pants; they have been in my possession since that time. I gave them to Mr. John Howard yesterday morning; I guess he had seen them before that. I do not know how long ago it has been since he first saw them. I could not tell you how long ago it has been since Abe or myself first called Mr. Howard's attention to this torn place in the pants. I don't know how

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long it has been since I showed it to him. I don't think I told Judge McCord about it. I don't think I told him anything about the torn place in the pants; if I did I have forgotten it.

Redirect examination:

The place where his leg was broken was exposed so I could see it. They had his pants leg rolled up, and I saw no cut place in the leg of the *britches* (breeches) at that time.

59 *Defendant's Testimony.*

J. A. KEY, witness for the defendant, after being duly sworn, testified as follows:

I live at Commerce at present, Commerce, Texas. I was at Big Sandy on the morning of February 7th, 1899, when Abe Behymer is said to have been hurt. I was in the employment of the Texas & Pacific Railway Company at that time in the capacity of conductor. I was conductor of the train on which Abe Behymer was braking. That train left Longview that morning about six o'clock; it was a local freight train. There were two more brakemen on the train, one named Stelson and one named Seay, and the engineer and fireman; the engineer's name was Smith, and the fireman's name was Ferguson. Behymer, Smith, Ferguson, Stelson, Seay and myself constituted the crew of that train. The weather was very cold that morning. It was an extra cold morning, and had been sleeting, raining and freezing, and the tops of the cars were covered with ice. I saw this accident when Behymer fell off — top of the car. My train had started to do some switching there at Big Sandy; we had some local freight for that point, but had unloaded it. Stelson, Seay and Behymer unloaded the freight, the whole crew, save and except the engineer and fireman; they remained in the cab, on the engine. After unloading the freight we backed up and cut off our engine and come in on the side track and hitched onto ten or twelve cars. Our local cars are always next to the caboose, and we pulled the local car up to the depot and unloaded our freight; that put the engine away up here beyond the railroad crossing. After unloading the freight we backed the whole train back down on the main line, cut off the engine and *come* (came) in on this side track; that is called the transfer track on which cars from the Cotton Belt to the Texas & Pacific and cars from the Texas & Pacific to the Cotton Belt are set. There is a platform along here south of the track. That morning we had cars to place along here at this platform for the agent to unload or load. I don't know the character of the contents of the cars, and we had other cars below this one switch, as well as I remember this 6500 was one we had to place a window to, that is place the end window in 6500 to an end window in a Texas & Pacific car. That is done in order that they may carry lumber out of the window, from one car to the other. It couldn't be carried out at the side door on account of being too long. As

conductor, I got my directions as to what to do at a station
60 in reference to the switching, etc., from the agent or his clerk.
The agent or his clerk makes up a list of what work they want done, and the cars they want at certain places. We had not accomplished anything at the time this man was hurt, except went in on the side track and coupled onto a string of cars. We went in there and coupled the engine onto this string of cars and pulled them out up over this crossing, as we were pulling over the crossing I saw Behymer lose his balance. I did not see him fall and hit the ground, as I got on the other side to give them a signal to stand still; I got on the fireman's side; that was the south side, or left side of the engine. When I saw him lose his balance I was here about the depot somewhere. Mr. Williams, the agent, was with me. After they pulled up here I saw him lose his balance, and I stepped over the main line and that threw me out of sight from him, but I could see the fireman and all the movement the cars made; after they pulled over there the slack was running back. It was about eight o'clock in the morning when he lost his balance. The cars were comparatively still when he lost his balance. The engine had run up west and had the signal to stop and had stopped and the slack *come* (came) back; after he lost his balance about the only move the cars made was the slack running out; that was after he lost his balance. I saw him fall on top of the car, and knew the top of the car was so slippery he couldn't stay on it; there was no way for him to stay up there, because it was so slippery he couldn't hold on. He fell on the north side of the track, and about two *ot* (or) three car-lengths west of the crossing as well as I remember. I went on that side of the track and gave them the stop signal; I flagged the signal to stand still. The swing brakeman was handling the list, when this accident occurred, and he intended to cut off a car and let it in on the main line. The swing brakeman is the man who handles the list by which the cars are adjusted in the train. Mr. Seay was the swing brakeman. When this accident occurred Stelson was at the switch, and Seay was intending to cut off this rear car. When I saw Behymer fall I hollooed to Seay not to cut it off. I don't remember whether Behymer was on the rear car in the string or next to the rear car. The car next to the one he fell off of was a tank car; a tank car is a flat car with an oil tank on it. That was the next car west from the one he fell off of. I had a conversation with Behymer that morning. I told him he was a young fellow, just starting to railroading, and it was a very disagreeable morning, and that it was all we could do,
61 who had had lots of experience, to stay on top of a car, and I wanted him to be very careful and not get hurt. I did not have any conversation with him about going on the cars at Big Sandy. The head brakeman and the swing and rear brakemen are supposed to know their place on the train. Each man is supposed to know his place and his part of the work without being told. I did not tell Behymer to go on top of any cars at Big Sandy. I did not have any conversation with Behymer in which he stated that it was dangerous and that he did not want to go on top of the cars, and

in which I told him it was not dangerous. I did not have any such conversation with him at Big Sandy. I was not doing anything at the time these cars were being switched except just standing around to see that they did the work like we wanted it done. When they got ready to go I was ready. It was not a part of my duties to set the brakes on the cars or do anything of the kind. I was present when Behymer was picked up and carried into the station; I was one of the parties who helped *picked* (pick) him up. The only thing I heard him say there that morning about how he got hurt or what caused it was that he lost his balance and fell. I did not hear him say anything about a spike or nail having caught the leg of his pants. I did not hear anything like that said there by him. I remained there until the doctor came; Dr. Dial is the name of the doctor. Dr. Dial was sent for to look after him. He is the local surgeon for the company there. I do not remember whether the agent sent for him or whether I sent after him myself. I could not say that I examined that car personally there that morning after he fell, but I had the car inspector to examine it. Mr. Hamlet is the car inspector.

That is considered a pretty heavy grade there at Big Sandy; it was much heavier at that time than it is now. The grade runs downhill east. In going up that grade when the engine stops still and don't move, the cars will come back and stretch out their full length; that is on account of the grade. I noticed that string of cars there that morning when the engine pulled out and stopped; the slack came out of the string, that is the train stretched out its full length. I noticed then when they *come* (came) back, and there was nothing unusual in their coming back. There was no extraordinary stop of the engine or running back of the slack. It is a fact that in stopping a freight train at a full stop there on that Big Sandy grade that when you start up you have to pull out the slack in order to get a start; that occurs there very often with passenger trains. In the discharge of the duties of a conductor he simply tells the
62 brakeman what work there is to be done at a switch, and they go to work and do it, and do not tell them to go up on this car and let off a brake or how the work is to be done. If he wants a certain lot of cars taken out of the siding and put in his train or anywhere else he just tells them what cars to get or take, and they go ahead and get them out as they see fit; the car that Be*y*hmer fell off of was a St. Louis Southwestern Railway Company car.

Cross-examination:

I do not direct any person to go up on top of the cars; they are supposed to do that without being told. I did not direct any person to go on top of any cars that morning; did not direct any of the crew to go up there. Be*y*hmer was the rear brakeman on my train. It is the caboose brakeman or rear brakeman's duty, when they are switching, to ride the cars. The duty of the head brakeman, when they are switched, is to let off brakes and throw the switches. The other brakeman handles the switch-list, and gives the directions

about pulling up and coming back. Beyhmer fell off of St. Louis Southwestern car 6500. I could not say whether it was next to the last car or third from the last car in the string. It was somewhere close to the rear end. The reason I can tell the number of the car is because I had a book and pencil and set it down. I know which car he fell off of, but I do not know the position in the string of cars it occupied; I found out which car he fell off of just like I would a man sitting in one of those chairs. If I were to see Brown fall out of his chair there I could tell what chair he fell out of. I can't tell whether it was the third from the last car or next to the last car in the string that he fell off of because I didn't count the cars. I went immediately after he fell off and got the number of the car. I told which car he fell off of by seeing him fall. The car did not move on any after the fall, and I took the number of the car standing there. I can't tell whether it was the first, second or third. A tank car was immediately west of the car he fell off of. I do not know what number that was, but it was the car next west to the one he fell off of. I saw Behymer loose his balance when they pulled up over the switch. He was on the tank car when they passed by me, and before they had gotten to the switch he had climbed up on the box car. He was on his feet. As soon as the cars got over the switch I discovered that he had lost his balance. I saw the train when it stopped. When the engine stopped of course the cars behind
the engine went on forward and bumped up against the
63 others and then the slack run back out. He lost his balance when the cars bumped up against each other, and he fell as the slack run out. They were moving about seven or eight miles an hour in going out of the switch. If these cars had been pulled out of the switch slowly there would have been a little slack in the train. When you are pulling a train there is no slack in it; it is all stretched out. It depends altogether on the speed the train is going as to whether the slack will run up against the engine or not.

Question. So then it could be run at a speed which the cars would not have bumped?

Answer. The engineer could have run up there at such a rate that the cars would have stopped themselves. That was not done that day; he applied the air on the engine very little; the train stopped as if he had put the air on his engine, putting the air on the engine is what caused those cars to bump up against one another; what caused the slack to come back was that they had run up together and closed up the slack. He could have pulled that train up there slow enough for the cars to have stopped themselves. He did that day just like he usually does. He stopped the cars just like he usually stops them in good weather; stopped them just as if there had been no ice on top of the cars. The engineer made no allowances for the fact that the tops of the cars were encased in ice that I took any notice of. I suppose the engineer knew the condition of the weather; there was nothing to prevent him knowing the condition of the weather that I know of. He could tell if it was raining and freezing; there was nothing in his condition to prevent

him from knowing what kind of weather it was. There was no difference that morning, so far as I could see, in the way he operated the train then and the way he operated it when the weather was good. The fact that the top of a car is encased with ice makes it more difficult to keep your balance. It is not a fact that I had directed one of the other brakemen in the crew to go on top of that train and he refused to do so. I did not tell Behymer to go on top of it. I did not give the engineer any directions about the operation of the train. I did not notify him of the fact that there was ice on top of the cars. The engineer could not see, from his position, that there was a man on top of the cars. It is not the engineer's duty to wait until a brakeman gets up on a car and lets brakes off before pulling out. If he can't pull them out with the brakes on he waits; he generally waits until he gets a signal to pull out. The engineer and fireman are up in what is called the cab of the engine.

That cab has glass windows in the front part of it, and the
64 back of the cab is open. It is so arranged that the engineer and fireman, being on the engine, may look back at the train behind them as well as look at the train in front of them. The main line there at Big Sandy is inclined to be a little on the curve. Right along by the depot and up as far as the engine went that morning and back towards the depot there is a little curve in the main line to the west. That curve is sufficient so that the engineer cannot see the whole part of the train. The fireman can see back and see the train. If a man was standing on the cars, in the middle of the car, he would not be visible to either the engineer or fireman looking back. The side of the car would cut the view off. The cab is so much lower than the cars that the engineer and *foreman* (fireman) cannot see a man standing on the cars. If he was standing on the car next to the engine he could be seen. The car is a good deal higher than the engine. I did not give the engineer any instructions as to how he should handle the train that morning at all. He is practical railroad man enough to use that judgment. When I saw Behymer fall he fell on top of the car somewhere near the east end of the car; that car was somewhere near the rear of the string of cars. When I saw him fall I stepped across the track on the fireman's side, and gave them the signal to stop. At the time he fell on the train they stopped all except the motion of the cars running back. The stop signal is given by moving both hands or one hand; either one or both; that is the signal I gave. You repeat that signal to have the engineer remain standing. The signal to stop is the same signal that we use to stand still. The reason I gave the signal was that the swing man was giving the signal to back up; he didn't know that the man had fallen. The man who was cutting them off was giving the signal to back up. At the time Behymer fell the last one of the string of cars had passed out of the switch.

Q. Did you notice, or do you know, whether, about the time that engine stopped first, that it started up again. Do you know whether that occurred or not, that it stopped once and then started to pull up further?

A. No, sir; that did not occur. My train pulled out a few min-

utes after Behymer was hurt. It was fully an hour before we left town. We got another brakeman, but we did not wait for him. The engineer in charge of the train was named Smith, and the fireman's name was Ferguson. The brakemen were named Stelson and Seay. I am working for a railroad company now; am working for the Cotton Belt. Have been working for them a little over a month. I had been railroading between six and seven years when this accident to Behymer happened; had been working for the Texas & Pacific that long; had been conductor of freight train on that road about two years and a half. After the accident I had the car inspector make an inspection of the car; I cannot think of his name just now; he is the joint car inspector for the Texas & Pacific and Cotton Belt at Big Sandy. I sent him up on top of the car to examine it. I did that because it is customary to send a man up there to examine the car, and I sent him up on top of the car before the train went out. I did not carry that car out in my train. I did not notice when he examined the car, but I gave him the number of the car to examine. I looked at the injury to Behymer's leg that morning; both bones in the leg appeared to be broken. I think a part of the bone was protruding through the skin when we first got to him, but in taking him up it pulled back in. We carried him into the depot on a grain door, and had him stretched out; he appeared to be suffering; he appeared to be in misery. I know if I had been in that condition I would have been in misery.

Defendant offers in evidence application for employment made by the plaintiff, Abe Behymer, which application is as follows, to wit:

"Texas & Pacific Railway Company.

Application for Situation as Brakeman.

I, Abe Behymer, apply to the Texas & Pacific Railway Company for a situation as brakeman, having written my answers to the following questions, making such answers a part of my application.

1. My full name is Abe Behymer.
2. My age is twenty-one years.
3. Nationality, American.
4. My height is five feet eight inches; color of eyes, gray; color of hair, brown.
5. Was born in Texas.
6. Am (married—single) single.
7. My family consists of mother and father who reside at No. — street, Longview, (town, Gregg county, Texas, State.)
8. My father and mother both living, and reside at No. — street; Longview, town, Gregg county, Texas, State. My father's name is George Behymer.
9. I have had experience in railroading as set forth below: None whatever.
10. Was last employed by —— R. R., and left their employment on account of blank.

66 11. State whether or not you are in any way unsound or deformed in body or limb, and if so, describe the defect: I am sound.

12. My hearing is good, and eyesight good, and am able to distinguish colors.

13. Do you use intoxicating liquors, and if so, to what extent? I do not.

14. Do you understand that it is contrary to the rules to drink while on duty, or to frequent places where intoxicants are sold? I do.

15. Of what orders or organizations are you a member? None.

16. You are hereby informed that this company does not block frogs and guard rails. Do you assume the risk incident to this state of facts? I do.

17. Do you make this application for employment in train service, realizing the hazardous nature of such employment, understanding that it is necessary in operating this railway for this company to have overhead and truss bridges at certain points on the line; also coal chutes, track scale, boxes, water tanks, coal-houses, platforms, sheds, roofs and other overhead and side structures, and that in the performance of the duties for which you are employed you are liable to receive injuries by being knocked off the side or top of cars; unless you use due care to avoid injury thereby? I do.

18. Do you agree to acquaint yourself with the locations of all overhead and truss bridges, as well as the location of all other structures along the line of the road? I do.

19. Do you understand also that this company does construct and maintain cattle-guards within or near by switch limits, over which cattle-guards it is necessary to frequently switch trains, and that in the performance of the duties for which you are employed you are liable to receive injuries, unless you use due care to avoid injury thereby? I do.

20. Have you been in the employ of this company before? If so, state on what division, in what capacity, and cause of leaving? I have not.

21. Do you understand that this company does not have all its main tracks and side tracks ballasted or surfaced, and that many of the side tracks being laid with old iron, are liable to have slivers on the rails, and that there are cattle-guards and uncovered drains on the main tracks and side tracks? I do.

22. Do you understand that no officer or employé of this company is authorized to request or require you to use defective tracks,
67 cars, machinery or appliances of any kind, and that when you do so you assume all risk of injury therefrom? I do.

23. Do you understand that this company desires to employ only experienced men in the service, and does not undertake to educate inexperienced men? I do.

24. Do you agree to rely on your co-employees, and not on the company, for information as to any and all things, including the character of, and kind of machinery and appliances which would

render your work dangerous, or subject you to injury, or which may be necessary to the proper performance of your duties? I do.

25. Do you acknowledge having been furnished with a copy of current time-table containing the rules and regulations for the government of the employés of this company, and do you agree to read said rules and be governed thereby? I do.

26. It is understood by me that if I am put to work temporarily pending the investigation, and my application is not approved that I agree to withdraw from the service of the company without complaint.

I, Abe Behymer, do hereby acknowledge having read the above questions, and that I have written the answers thereto with my own hand.

In witness whereof I hereby set my signature, this the 4th day of October, 1898.

ABE BEHYMER.

Address: Longview, Texas.

Witnessed by:
E. W. JOHNSON.

(Indorsed:) No. —. The Texas & Pacific Railway Company. — div. Application of —— —— for position as —, dated —, *dated* approved ——. This application after being filled out and approved, is to be filed in the office of the division superintendent, division master mechanic, or other head of department in which applicant is employed."

Defendant offers in evidence the following railway surgeon's report on the first page, and statement of person injured on second page, dated February 25th, 1899.

Texas & Pacific Railway Co.

Local Surgeon's Report.

Eastern division.

1. Name and residence of the person injured? Abe Behymer.

68 2. Date of injury. February 7th, 1899. At or near what station? Big Sandy, Texas.

3. Age, twenty-one; occupation, fr't brakeman. Department, transpt. Married. X or single. Yes. If married date of marriage. X.

4. Employee, passenger or neither. Employee.

5. By whom was party first employed? E. W. Campbell.

6. Give description, stating as near as you can, the parts injured, their extent and their supposed manner of infliction. Compound fracture L. tibra middle third; fracture L. fibula middle third.

7. What was done with and for the person? Attended by local surgeon, Big Sandy. Admitted to hospital on date of accident.

8. What does the injured person say as to cause of his injuries, giving as near as possible the patient's own words? After letting off brakes of car slack of train running together threw me from top of car on which I was standing, and fell between cars sustaining above-stated injuries.

9. To whom was this said? Undersigned.

10. Who witnessed the accident, and give their names, residences and occupation. Agent at Big Sandy saw me fall.

11. If an employee, give name of his conductor or foreman. E. W. Campbell.

12. Prognosis. Favorable.

Sign here: R. S. TAYLOR, *H. S.*

N. B.—Make out report with least possible delay.

Statement of Injured Person.

1. In your opinion, was the carelessness on the part of any one in the company's employ, tending to cause the accident, and if so, who?

Answer. No.

2. Could you by more care on your part, have prevented your injury?

Answer. No.

3. How long have you been in the company's employ?

Answer. Four months.

4. State all other particulars that you may know relative to the accident.

Answer. None.

5. If married, of whom does your family consist?

Answer. Single.

69 The above is a true statement to the best of my knowledge and belief.

(Signed) ABE BEHYMER.

Witness:

R. C. TAYLOR.

Date February 25th, 1899.

N. B.—State any additional points relative to accident which you may deem of interest and profit to the company.

(Indorsed:) The Texas & Pacific Railway Company. A surgeon's report, eastern division, at Big Sandy. Date 2-7-1899. Abe Behymer. This report is to be made out as early as possible on the occurrence of an accident and forwarded at once to your respective chief surgeon's office. Make out this report as complete as possible, leaving no heading unanswered.

Discharged June 25th, 1899, in hospital four months and nineteen days. Entered February 7th.

Defendant offers in evidence Dr. Dial's, local surgeon at Big Sandy, report, bearing date February 7th, 1899, the date on which the accident occurred. The report is as follows:

Texas & Pacific Railway Company.

Local Surgeon's Report.

Eastern division.

1. Name and residence of the person injured. Abe Behymer, Longview, Texas.
2. Date of injury. February 7th, 1899. At or near what station. Big Sandy.
3. Age, —; occupation, brakeman; department, transportation; married—or single, yes; if married, date of marriage. —.
4. Employé, passenger or neither. Employé.
5. By whom was party first employed? C. A. Foster.
6. Give a description, stating (as near as you can) the injured parts, their extent and their supposed manner of infliction. Compound fracture of the left leg about the middle third, by falling from top of box car.
7. What was done with and for the person? Was taken to the depot and I placed his leg in position, bandaged it so as to hold it until he could get to hospital.
8. What does the injured person say as to the cause of his injuries, give as near as possible the patient's own words? Says he slipped and fell to the ground.
9. To whom was this said? H. C. Dial.
10. Who witnessed the accident, and give their names and residences and occupation. Mr. Bundy saw him fall; cashier Texas & Pacific railway at this place.
11. If an employé, give name of his conductor or foreman? Key.
12. Prognosis. The leg can be, in my judgment, saved and made a good leg.

Sign here: H. C. DIAL, *L. S.*

N. B.—Make out report with least possible delay.

Statement of Injured Person.

1. In your opinion, was the carelessness on the part of any one in the company's employ tending to cause the accident, and if so, who?
Answer. No, it was not.
2. Could you, by more care on your part, have prevented your injury?
Answer. Do not know.
3. How long have you been in the company's employ?
Answer. Since October 23rd, 1898.
4. State all other particulars that you may know relative to the accident.
Answer. —.

5. If married, of whom does your family consist?
Answer. Single.
The above is a true statement to the best of my knowledge and belief.

(Signed) ABE BEHYMER.

Witness:
H. C. DIAL.

Date ——, 189–.

N. B.—State any additional points relative to accident which you may deem of interest and profit to the company.

(Indorsed:) The Texas & Pacific Railway Company. A surgeon's report, eastern division, at Big Sandy. Date, February 7th, 1899. Abe Behymer. This report is to be made out as early as possible on the occurrence of an accident and forwarded at once to your respective chief surgeon's office. Make out this report as complete as possible, leaving no heading unanswered.

C. A. SMITH, witness for the defendant, after being duly sworn, testified as follows:

I remember the accident on February 7th, 1899, when Abe Behymer was injured. I am a locomotive engineer, and am working for the Texas & Pacific Railway Company; have worked for that company since December, 1888. I was working for that company as engineer on the 7th day of February,
71 1899. I was engineer on train number two that morning; it was a local freight train, going west; the train was made up at Longview Junction. We left Longview that morning about 5.55 o'clock. My train crew was composed of myself, engineer; J. E. Ferguson, fireman; Conductor Key, and the brakemen were Stelson, Seay and Mr. Behymer. It was very severe weather that morning, was raining and sleeting, and was when we left Longview that morning. We arrived at Big Sandy about nine o'clock in the morning; we had some local work to do at that place, had some freight to unload. I remained on my engine up to the time of the accident. The first thing we did there that morning was to spot the local cars; I mean by that to put them to a place where they could be unloaded at the depot platform; then we cut off part of our train and coupled up the engine to the cars on the side track; there were some cars to be picked up. I acted on signals altogether. We pulled the cut of cars out of the side track, and after we got over the switch on the main line we came to a full stop; that is all that was done until the accident occurred. When I pulled out of the switch and stopped, the fireman said "Hold that." I said What is the matter, and he said There must be some one hurt. The fireman is on the left-hand side of the track; he was on the side opposite the depot; the track is curved there. It is upgrade very steep along there going west. The fireman came over to my side and says There is some one hurt, and we both got off of the engine and walked back,

and I saw one of the brakemen, Mr. Behymer, was hurt. He had not been picked up when we got back there but was still lying on the ground; I then went back to take care of my engine. We were not moving over six or eight miles an hour in moving those cars out of the siding; we had quite a string of cars. I made the usual stop; just stopped when I got the signal to stop; I had air on the engine and applied it to the engine to stop. When I made the stop the slack of the cars ran up towards the engine, and I had my brakes set and the slack of the cars running back caused a little jar. I made that stop because I got a signal to stop; we were supposed to stop after we got out of the side track onto the main line; didn't have to work any steam to cut off a car there; they would cut off a car and I would put on my brake again; the cars would roll down themselves. I don't know how many cars we had in that string, but it looked like there might have been ten or twelve; when I stopped the slack run up towards the engine; there was nothing unusual in that. We had not made any other moves there that morning. When I made the stop out there to let the cars go
72 in on the main line the stop was nothing unusual; it was no more sudden than usual. I have no control over the slack in the cars; that is by the motion of the cars themselves. I had no air that run to the cars. I did not see Mr. Behymer any more after I went back to my engine. I did not hear him say how he came to fall off the car; I asked him if he was hurt, and he said yes, he was hurt pretty bad. Mr. Ferguson was the fireman, and was on the engine with me.

Cross-examination:

The rate of speed I was using that morning in pulling those cars out of that siding was about the usual rate of speed that I use in making switches of that kind. That was about the usual speed I would use in making that kind of a switch under the same circumstances. It is not a fact that I was going faster than usual in pulling that string of cars out of the siding; was using just about the same speed. It was upgrade where my engine was standing, and upgrade for some distance beyond, possibly a quarter of a mile. It is possible that those cars could have been pulled up in such a manner that the weight of the train would have stopped itself. If I had cut the steam off my engine and let the train roll far enough, the weight of it would have stopped it. I did not choose to let it roll; I shut off the steam, and put on the air, and made my stop. When you want to stop an engine you cut the steam off and apply the air brakes to the engine. That causes the cars to come against each other, and then the weight of the cars pulls them back and pulls the slack out of the train. If I let it go to a stop itself the cars would come on up, and the momentum of the cars would go back just the same and pull me back. What makes the slack is that the engine is stopped before the cars are and they bump up against each other, and then the slack pulls back. I was not running as fast that morning as I would run on a level track. The condition

of the weather and the tops of the cars had nothing to do with my stop at all. There was nothing to take into consideration. In making that stop I can't say that I took into consideration, or made any allowance for the condition of the weather of the tops of the cars. I knew there was ice on top of the cars; there was ice everywhere. I have been railroading since 1888. I understood at that time that it was more difficult for a man to operate on top of a car covered with ice than it was on one not covered with ice. It was the rear brakeman's duty to release the brakes; that was Mr. Behymer. The side track or transfer track is on a downgrade to the east. It is necessary to hold the cars in on the siding to set the brakes
73 on them. I understood that morning that the brakes on those cars, or some of them, were set, and understood that it was necessary for them to be released. I knew there was a man on top of the cars. After those cars are pulled out on the main line those that are to go back on the main line are simply cut loose and they go back of their own weight, and it is necessary for a brakeman to be on top of the cars to control them. It was necessary for Mr. Behymer to ride those cars out of the switch in order to ride them back down the main line; he was at his proper place of duty; there was a brakeman on top of the cars to ride them. Behymer was lying there where he fell when I got down there. He was lying three or four cars from my engine. I couldn't tell you how far he was from the east end of the string of cars. We had about twelve cars in the string. If I remember right he was some six or eight cars from the rear end of the string of cars. I couldn't see him from my engine, and don't know what car he fell off of. Some cars have about six or eight inches slack. I don't know whether there would be five or six feet slack in a train of twelve cars or not. Probably some of them would not have over three inches. I do not know whether any of the couplings in that string of cars were link couplings or not. There is more slack in a link coupling than in an automatic coupling. I did not see Behymer when he fell, and don't know how he fell or how come him to fall. I couldn't tell you whether any of the cars in that string had air brakes on them or not. I only had the air working on the engine.

Q. In pulling a train of cars out of a siding, for instance, with the intention of running them back down the main line, is it not customary for the engineer, when he pulls out and gets clear of the switch and gets the signal to stop, intending to go back, is it not customary for him to cut off his steam and apply the air brakes, and at the same time put his engine in reverse motion?

A. No, sir. He does not put his engine in reverse motion on a grade like that. I don't move any until I get a signal. I never back up until I get a signal to back up.

Redirect examination:

If I were to put my engine in reverse motion on a grade like that I would go back down the grade. Ferguson was my fireman. He went down to where Behymer was lying with me, and stayed with

him until they took him into the depot. I went back and
74 took charge of the engine. You could pull twelve cars very easily up that Big Sandy grade.

Q. I will ask you Mr. Smith about starting your train, say you have got ten or twelve loaded cars on that Big Sandy grade there, could you make a start up the grade unless you took up the slack?

A. You could pull twelve cars up very easily, provided there were no brakes on. It is a very difficult matter to get out of there with twenty loads. We always take our train to Ferguson and then take the cars back. It would be impossible, with a heavy train, to start them at all without running back and taking up the slack.

W. H. HAMLETT, witness for defendant, after being duly sworn, testified as follows:

I work at Big Sandy as car inspector for the Texas & Pacific and Cotton Belt railways; have been there at that work a little over seven years; was working there on the 7th day of February 1899 when Behymer got hurt. I saw him lift the ground. I was at the northwest part of the depot just at the corner of the colored waiting-room. I examined that car after this accident. It was a Cotton Belt car number 6500; it was a box car; I took the number of it there after the accident. I did that because I got a message from Mr. Campbell to examine the car with respect to roof, running board, etc. Mr. Campbell is the division superintendent of the Texas & Pacific Railway Company. I suppose Mr. Key reported the accident to him. I guess I inspected the car fifteen or twenty minutes after the accident. The car was on what we call the platform track of the Texas & Pacific R. R. at the time I inspected it; was standing at the platform; the train had not left there at the time I made the inspection. I examined the roof, running board, hand-holds and brake on top of the car. I went over the roof, got up on top of the car myself and went over the roof. I did not observe anything out of the way. The top of the car was covered pretty thick with ice, about a half inch of ice on top of the car. I examined the running board. The running board is boards placed on top of the car in the nature of a walkway; they are raised so as to be level. The top of the car is rounding, and the running board is level. The top of the car is not exactly what you would call rounding but it slants down both ways. It is just like the roof of a house only it is not so steep. The running board is from twenty-two to twenty-four inches wide generally; sometimes a few inches less. There were no spike
or nail protruding above the running board on top of that
75 car. I was over that car and all the other cars on the transfer track that morning. My business is car inspector. My principal duties are to inspect and keep a record of interchangeable cars between the two roads. I mean by inspecting cars to look over them and see what kind of condition they are in, and make a record of it. If a car is out of order and it is repairs that I can do I make them. If a car is out of order and the repairs are such that I cannot make them, if the repairs are such that the car is not safe to handle I send them to the shop, to the Texas & Pacific at Mar-

shall and the Cotton Belt at Tyler. I was present when Mr. Behymer was picked up and carried into the depot. I was asked for a report as to the cause of the accident to him. Mr. Campbell asked me by wire; he asked me for a report by wire and I sent him the wire report and also a report by letter. Whether he asked me for the two of them I don't remember, but he asked me for one by wire and I sent him a wire statement and also a letter. I had some conversation with Mr. Behymer that morning before I made any report as to the cause of the accident. I got a message from Mr. Campbell, and have it in my pocket now, to examine the condition of the car in regard to hand-holds, running board, and I believe brake on top of car, and I took the message and showed it to him, Mr. Behymer, and asked him how I should answer. He said there wasn't a thing wrong with the car. I said I will report the car O. K., and he said yes, and I reported the car O. K. He did not say anything to me that time about any protruding spike or nail in the running board. I did not hear anything of that kind. I did not notice any torn place on the leg of his pants at that time, and did not call his attention to anything of that kind. He was in the waiting-room of the depot at Big Sandy at the time he made the statement to me that the car was O. K. There were a good many talking in the waiting-room, and he was talking *to* (too), and the only thing he said to me about how he come to fall was that he fell. I can't be positive whether he told me he slipped and fell or not. Dr. Dial was in and out there while I was there. Mr. Williams is the joint agent for the two roads at Big Sandy. I was at the northwest corner of the depot at the time this man fell off the car.

Cross-examination:

I reckon it was an hour or something like that after Behymer was hurt before I got the request from Mr. Campbell to examine
76 and report the condition of the car. Dr. Dial was there working on his leg or had been working on it at the time I got that request. When I received that telegram I went and showed it to the injured man. He was lying there on the floor; he did not seem to be suffering. I helped pick him up and carry him into the depot, and saw the nature of his injury. I saw that his leg had been knocked around, indicating that all the bones in that part of the leg had been broken. When we picked him up part of the bone was sticking out through the flesh. I carried Campbell's telegram down to him and let him read it, and he told me to report the car O. K. I did not report that Behymer told me it was O. K. It was to the Mr. Campbell that has been here in attendance upon this trial. I do not know whether he is required to keep a record of all his reports or not. I have seen that report that I made within the last few days, in possession of Judge Duncan, one of the lawyers in this case. I did not say anything in that report about Mr. Behymer saying that I could report the car O. K. In my report I did not say anything about having submitted the matter to Behymer and that he said it was all right. I thought at that time that Mr. Behymer

was in a proper condition to advise me what report to make as to the condition of that car. It is not a fact that I carried that telegram to him and submitted it to him in order to commit him to that proposition. That is not the reason why I carried it to him. I made a personal examination of the car before I took it to him, and before I got it. Before I got that telegram I had already made a personal examination of that car, and after I received that telegram I made another examination; made a second examination of the car after I received the telegram. I examined the roof, running board, hand-holds and brakes. I examined St. Louis Southwestern car number 6500. That is the only car I examined after this accident. The car was there and any one knew which one he fell off of.

Q. Did you know which car it was, or did the conductor of the train give you the number?

A. He fell where I saw him fall. I got the number for the superintendent when I answered his message; I had made an examination of this car before I received the message. 6500 is the one he said he fell off of. I don't know whether he said that exactly or not. It is not a fact that I got the number of the car to examine and examined the car that the conductor told me he fell off of. When a man falls on the ground I guess you can see what he falls off of, and it is the inspector's duty to examine cars where people get hurt.

77 He fell off on the ground and everybody was saying That is the car he fell off of. Where a man hits the ground it stands to reason that he fell off the car there at him. I saw the car that he fell off of. Really I couldn't say that he fell off of any car; I saw him hit the ground right there by this car right at the east end of this car. To the best of my recollection I think there was two or maybe three cars east of this car in the string. It is not a fact that he fell off of the rear car; I have not said that he fell off of the last car. It is not a fact that I told Mr. John Howard, at Big Sandy, that the car he fell off of and the car that I examine(d) was the last car, or east car in that string of cars. I know Mr. Behymer and know Mr. John Howard. A whole crowd of them were in the office there at Big Sandy about last September and every one was talking about this case. I was talking about it, and was talking about the car he fell off of. I did not tell him in Mr. Howard's presence that the car that I examined was the rear car in that string of cars. I don't know that I told them anything particular about what car he fell off of. There was some two or three cars in that string east of the car he fell from. I don't think he fell off of the car next to the last car in the east end of the string. I think there were two or three cars east of the one he fell from. I did not get on top of the other cars in that string. I examined a box car; I think there must have been as many as two cars east of the one I examined. The car that I examined was immediately east of the tank car, and was two or three cars from the east end of the string. I examined the top of that car by getting on top of it and looking at it closely. I was looking for any trouble that might exist. Those running boards are fastened down to the top

of the cars with nails. Those running boards are made out of inch boards, and they are nailed onto cleats which are fastened to the top of the car. Those cleats are about an inch thick at one end and an inch and a half at the other end. It is customary for them to be nailed on with eight-penny wire nails. Some of the running boards are made out of inch and a half stuff. The cleats are first nailed onto the top of the cars and the running boards are nailed onto them. I did not see any signs upon the car where I was where this man had fallen. The car had been walked over a good deal, and I couldn't see any signs of where he had been slipping. I don't think it had been walked on after he was injured. We put the injured man away, and then I went up on top of the car, some fifteen or twenty minutes after the accident. I did not notice any
78 signs on top of the car where he had slipped or had fallen. I couldn't say that I examine(d) for any. I never noticed any signs of that kind on the car that I examined. When I first saw Behymer falling I guess he was about the top or somewhere near the top of the bottom part of the car; he was about three feet off the ground when I saw him; he was falling with his head out; his feet *was* (were) towards the cars. He was on the outside of the cars entirely. He was not between the cars. From the way he was going he seemed to be coming out from between the cars. It looked like he had been between the cars and was coming out, was kicking and scrambling like he was trying to get out. His feet hit the ground first and then his body; I went immediately to him, and was the first man to him, that is three or four of us got to him about the same time. What attracted my attention to him was that I was just looking at the train switch; when he fell I had been through the depot on the Cotton Belt side. I thought I heard a train on the Cotton Belt, and when I turned I saw him. When I left the Texas & Pacific side and went through the depot the train was pulling west. I walked right on through the depot and looked up and saw him fall. When I looked up the train I thought it was moving west slowly. It didn't go over three or four feet after he hit the ground. They were pulling up and were just about over the switch and had stopped or were in the act of stopping when I saw him hit the ground. The car that he fell off of moved a little further west than where he hit the ground before it *come* (came) to a full stop, at least, that is the way I saw it from the position I was in; I was looking at it at an angle. There is a curve there and I was about thirty or thirty-five feet from the track. At the time I saw it the train had just about cleared this crossing. It appeared to me that the train had just about *clared* (cleared) this crossing at the time I saw the man fall. And after he hit the ground the train appeared to move a few feet further west before it *come* (came) to a stop. The car that he was on stood a few feet further west than where he hit the ground. Any other motion between the time I went through the depot and the time I got around there I didn't see it. I could not tell whether he fell off of the car in front of the coupling or the car behind the coupling where he was. When I saw him he was coming out from between two cars.

79 B. T. STELSON, witness for the defendant, after being duly sworn, testified as follows:

I live in Longview, Texas, and my occupation is that of brakeman. I was breaking on the train on the 7th day of February, 1899, and was braking on the train from which Abe Behymer fell, at Big Sandy. I was braking ahead. At the time he fell I was at the switch about fifty or sixty yards from him; was throwing the switch to let the engine and cars out; that is what we called the transfer switch; the engine pulled about twelve or fifteen cars out of there; I did not count them. I saw Behymer when he started down between the cars; I was on the south side of the train. We were taking these cars out of there to do some switching for the agent there. I was not what is called the swing brakeman. William Seay was swing brakeman. I was out there switching because it was our business to do the switching. The local has all that switching to do. I did some work on that string of cars there after this man got hurt, but not until after he was hurt. It was my business to throw the switch and let the cars out on the main line. I saw him coming up from an oil car three or four or two cars from the car he fell off of. The swingman was up there ready to cut off some cars, and when the slack *come* (came) back from the engine I saw that Abe Behymer was going to fall, that he had slipped, and I hollooed to the swingman not to cut them off. I started down towards him, and he fell down between the cars; fell off the east end of the car he was on. It seems to me that he was a little over half way towards the east end when he lost his balance and slipped. He was coming east; he went up on top of the cars to let off the brakes so they could handle the cars. He had crossed several cars in getting to this one; there was a tank car in that string; I think it was right ahead of the car he fell off of; I think there were three cars behind the tank car; those tankscars are not provided with running boards on top of the tanks; this car had a hand rail or side rail. Behymer climbed upon the side ladder on top of the car he fell off of. The engine was not in motion at the time he slipped, but the slack was; there is some slack in all freight trains; the engine had stopped at the time he fell; he fell just as soon as the cars could run up and come back. It was when the slack run out that he lost his balance; he fell going east. He was facing in that direction and was walking in that direction when the slack *come* (came) out. When he fell I ran around to him; I think I was the first man to him. I asked him if he was hurt, and he said his leg was

80 broken, and I went down below the depot and brought a grain door up there to put him on. We sent for the physician; I did not remain there long with him. I did not hear him make any statement as to how he fell off the car. All I heard him say was I wish I had never seen the job of braking. I couldn't say whether the swing brakeman had been on top of the cars that morning or not; we did some switching at Gladewater. There was nothing unusual in the motion of the slack running out of that train. The slack always runs back downgrade; the engine was not stopped any more sudden than it ordinarily is. I was on top of the car he fell

off of afterwards. It was a Southwestern car, but I don't remember the number. I got up on top of the car and rode it down the main line after Behymer got hurt. I did not notice any spike or nail sticking up in the foot-board or running board of that car. I think the brake on that car was in perfect order. We did not carry that car out with us that morning, but left it there on the transfer track.

Cross-examination:

I don't remember how many of those cars we took out that morning; don't remember whether we took any of them out with us. Don't remember exactly how many times we switched that Southwestern car around there; do not know what became of it afterwards; I acted as brakeman after that, and rode the car down. Before Behymer got hurt I was throwing the switch, and the swingman was directing the switching; it is the rear brakeman's duty to go on the cars and turn on and off the brakes; he did not necessarily have to turn off these brakes before we could get the cars out; the cars would not stand there without the brakes being set. When the engine started in I rode back with it and coupled onto the cars. I don't remember how far below the switch that threw the engine when I coupled onto the cars; I don't think it was over a car-length, but I don't remember. I got off at the switch and he pulled the train out. The train was going six or seven or eight or ten miles an hour. I don't know whether we got to Big Sandy on time that morning or not; I didn't have a watch; this switching was done just like it is done every time there. The engineer did not make any allowance for the condition of the weather and sleet being on the cars, but just went ahead with the switching; made no allowance for that at all. The train pulled up and the rear car got up above the crossing when Abe fell. There was a tank car in the string; the tank car was two cars ahead of the car
81 he fell off of; it was either one or two cars ahead of it; I think we had three cars behind the tank car; I think he fell off the car next to the last car in the string, and the tank car was one car ahead of it. These tank cars have rails to catch onto and you walk alongside of the tank. He was walking when I first saw him, and he kinder stumbled like and the last I saw he was going down between the cars; he fell on the other side from the one I was on; I suppose the train was going seven or eight or ten miles an hour. When he got over the switch I gave him the signal to stop; the last car was about two car-lengths west of the switch when they stopped; the train was not stopped any more sudden than usual. They usually stop it there very suddenly because it is upgrade and they put on the brakes and stop the cars and the cars run right back; that makes the cars bump back and forth. That did not attract my attention. Don't know whether all those cars were coupled together with the approved couplers or not; I suppose there were some link couplings in the string; there is a great deal more slack in a link than in an automatic coupler. Behymer was on top of the cars there performing his duties as brakeman; was in the discharge of his

duties on that train. The engineer stopped the train that morning with the usual stop; working under that engineer was not my regular job; we have different engineers. He stopped so the cars behind the engine run up against each other; they do that nearly every time they stop, and then the slack runs back the other way. There was no difference in the stop that morning and the usual stop. They sometimes stop that way and sometimes make a good, easy stop. This was a sudden stop.

Q. Was it not possible to pull those cars out of that switch and the engineer cut off his steam and allow that train to have slowed down by its own motion, and therefore not have the bumping of it?

A. Yes, sir; we could have done that, but we would never get over the road. We always hurry as fast as we can. The employés are paid by the mile and the time they are out. It would have been very hard to have pulled that train out of that switch in such a way that the slack would not have run forward and then back. He could have pulled it out of there and let the weight of the train stop itself, still the slack would have run back. He could hardly have stopped the train so gradually that the slack would not have run forward. It is more dangerous to walk on a car encased with ice than one that is not. Behymer was nearer the end of the car he fell off at than he was the other end at the time he lost his
82 balance. He kinder staggered like and then just kept going. He appeared to fall on top of the car and went on down between the cars. I don't remember whether he fell face downward or not. He fell in the direction in which he was staggering. I was not on top of any of those cars there at Big Sandy before he was hurt. My recollection is that it was the car next to the last car in the string that he fell off of, and that there were three box cars back of the tank car; I noticed the tank car when he was falling off of the other one, and my recollection is that there was another car between the tank car and the one he fell off of. The swingman gives the directions in making switches that way. The agent makes out a list of the work to be done and gives it to the swingman; the conductor comes out and helps do the switching sometimes. The conductor was standing right behind me at the time Behymer fell, and was looking towards the engine; he was just a few feet behind me; I mean out by the switch where this side track runs into the main line. I was standing at the switch and the conductor was right east of me, I think in between the two tracks there. The swingman was up there cutting off the cars, and when I saw Abe fall I hallooed to him not to cut off the car.

Redirect examination:

I did not hear anything said there about a spike sticking up in the running board. I did not see anything sticking up in the running board; if there had been anything sticking up out of the running board I think I would have seen it. I did not hear anything there about Abe's pants being torn, and did not notice anything of that kind.

H. A. WILLIAMS, witness for the defendant, after being duly sworn, testified as follows:

I live at Big Sandy, Texas, and have lived there six years and a half. I am freight and ticket agent for the Texas & Pacific and Cotton Belt railroads at that place. Am a joint agent; held the same position on the 7th day of February, 1899. I remember the day that Mr. Behymer fell and was hurt; I saw the accident. I was on the passenger platform of the depot at the time the accident occurred. The rough drawing I have here of the road, depot, etc., is pretty near correct; I was on the platform right in front of the depot when the accident occurred, and saw the string of cars as it was being pulled out of the siding. I saw Behymer on the tank car as they passed me; he was going east and the train was going west; as the
83 train passed me I saw Behymer on the oil-tank car. I saw the car he fell off of; he fell from a Southwestern car, number 6500. That car did not go out in that train; it went north on the Cotton Belt road from Big Sandy; I saw Behymer as he was starting up on that car, and saw him after he got on top of it. As he passed by me he was attempting to get from the tank car onto the box car, this number 6500. His feet were on the tank car and his hands were on the ladder, and I saw him on top of the box car afterwards just about the time the train was stopping. I saw him when he first began to fall; the train was pulling up and about the time it stopped he seemed to loose his footing, and seemed to be slipping on account of the ice being on top of the car, and the train stopped, but he just kept going and went down between the cars, and the next I saw he was scrambling out from between the cars. He struck the ground about eighty feet west of the Cotton Belt crossing, and about three hundred feet from the depot. I went up there to him at once; the train must have been going five or six miles an hour in pulling out of the siding. I could not tell you exactly how many cars were in that string of cars; my best recollection is that there were eight or ten cars. The next car west from the car from which he fell was the oil-tank car, and he got up from the tank car onto the box car from which he fell. When I got there to where he was I found him lying on the ground, and I thought his leg was broken. He was picked up then and carried into the station. I noticed the car at that time so as to be able to identify it, and I know he fell from a St. Louis Southwestern car number 6500. I saw Behymer two or three times after he was carried into the station. Dr. Dial attended him. Dr. Dial is now at Big Sandy; he is not here because he is sick. I went to his home particularly to get him to come; went up to see him to get him to come if possible; he has a very bad cold or something like the grippe.

I keep a record of all the cars on those tracks there. I take the numbers and names of every car in the yard every morning about six or seven o'clock. That record shows the position of the cars in the string of cars. I have that record with me. It is a record of the cars and the position they occupied in the string of cars that morning. The record was made up about thirty minutes before this train arrived, that is the train upon which Behymer was hurt. This is a record of

all the cars and the places on the transfer track they occupy. It is made by a man who commences at one end of the yard and goes clear through it, and takes the cars as they stand on the track. This record was made by a man by the name of Greenwell, who
84 now lives at Big Sandy. He was porter there at the depot at this time, and is a negro. S. W. stands for Southwestern; T. L. for tank line; I. C. *and* for Illinois Central; B. L. means box loaded. The man who made this record is at Big Sandy. This is a record that was made at the time or just before this accident occurred.

Defendant offers that page of the record book in evidence, which is as follows:

Trs. West end. February 7th, 1899.

S. W. 8820 B. L.
S. W. 6260 B. L.
S. W. 7724 B. L.
T. L. 287 tank.
S. W. 6500 B. L.
S. W. 6386 B. E.
S. W. 7479 B. L.
I. C. 15906 B. E.
B. O. 12699 C. E.
S. W. 10114 B. E.
T. P. 4499 F. L.

Trs. means transfer; that shows the track they are on. The first car is 8920 box loaded; the next is 6260 box loaded; the next is 7724 box loaded; the next is 287 tank line; the next is 6500 box loaded, and the next is 6386 box empty, etc. That is a complete record of the cars that were standing on that track that morning. That includes all the cars. There is nothing in this record to show which one of those cars were moved that morning; we only take a record once a day, every morning; just once every twenty-four hours. We take that record just before the local arrives every morning. Those records along there on the next page of the book are records for the next days. In the meantime this car had gone out. The man who took this record commenced at the west end of the transfer track, where it ran into the main line, and numbered them down this way east. C. E. means coal empty, and B. E. means box empty; F. L. means flat loaded and S. L. means stock car loaded, not empty.

I noticed the stop made by the engineer that morning in stopping that string of cars. There was only a few seconds between the stopping of the engine and the running out of the slack of the train and Behymer losing his footing. It was almost instantly. I am familiar with the switching of freight trains at that point; there was
85 nothing unusual about the stop made that morning, nor in the running out of the slack of the train. There is a very heavy grade there going west. I heard Behymer say he slipped

and fell off the cars. I did not hear him say anything about his pants having caught on a nail. I did not notice anything about his pants being torn. I saw him after he was carried into the station. I did not hear him say anything at all in regard to a nail having caught his pants. Dr. Dial came there and waited on him. At the time this man fell, Key, the conductor, was by my side, very close to me; he was the conductor on that train. It is my duty as agent to tell the conductor and crew what work to do; we have what we call switch-lists that we hand out to them.

Cross-examination:

I couldn't say whether all the cars standing on that transfer track were to be handled that morning or not, according to the swi-ch-list that I handed out. We keep a record of that at the time, but we don't keep it permanently. We make a record of it at the time, but as soon as the work is completed we have no further use for it. The conductor carries it away with him, and I don't know whether he keeps those records or not. That switch-list is made out from this book and the waybills. In other words I take the business of my office, and from that I tell him what cars I want moved, and give him a list to indicate what is to be done. I did not preserve that list, and can't tell you now whether all the cars in that string were to be moved or not. I don't remember whether they moved all the cars in that string or not. It seems to me that they moved up as far as this Cotton Belt car and one below it. I know they moved one car below this Cotton Belt car. I couldn't say whether that was the Illinois Central or not, but I know it was the car east of that car. There were two other Cotton Belt cars east of car number 6500; they moved more than five cars. I can look at the records there and tell you whether they moved more than six cars or not. I couldn't say whether they moved more than six cars or not, but I can look at that record you have there and tell whether they moved more than six or not. If you include only one car east of the one he fell off of they only moved six cars. I believe they moved more than six cars. Probably they moved eight or ten cars. If they moved more than six cars 6500 was number five in that list commencing at the west end of the string; 8920 was the west car the next one was Southwestern 6260; the next one Southwestern 7724; the fourth car was tank car 287, and the fifth
86 car in the string was Southwestern car 6500. Number 6500 is a box car; 6385 is also a box car; the next one, 7479 is a stock car, but it has a roof on it and a running board just like the box cars; the next car, 15906 is a box car of the Illinois Central. That is the eighth car. The ninth car is Baltimore and Ohio 79699, a coal car. Car number 6500 is the fifth car from the west end of that string. I think they hauled more than six cars out of there. I would not say whether they pulled out more than seven cars. I know they pulled out more than six cars. I did not count the cars pulled out of that switch; they had six or eight cars. There could have been as many as ten, but I am not positive that there

were that many. The next car west of 6500 is the oil-tank car and the one next west of that is box car number 77[illegible]. I couldn't tell you which car he fell off of with reference to the east end of the string of cars they were moving. I couldn't tell you whether he fell off of the car next to the last car or not. I think there were as many as three cars east of the one he fell off of. I know that he fell off of car number 6500, because I looked at the car and took the number; I went right out and took the number of the car. He said he fell off of this car and I took the number, 6500, and put it down and afterwards made a report. My best opinion as to the number of cars that were pulled out of that switch is that there were from five to ten; I know there were that many cars there that could have been moved. I don't know how many cars from the east end of the string of cars the car was that he fell from. I know there was as many as one. I couldn't say whether there were as many as two or not.

That train stopped suddenly enough for the cars to run on forward and bump up against the engine and each other. The slack run back; that is a considerable grade there at Big Sandy. I have been agent there six years and a half, and have observed the switching there about the depot and depot grounds. It is possible for those cars to have been pulled out of that siding onto the main line and the engine and cars stopped gradually so that the rear cars would not bump up against each other. The only difference in that and stopping them suddenly is the saving in the time; it would consume a little more time to stop them gradually. That engine and cars were stopped about the usual way that morning. That stop was about the ordinary stop. It is a fact that in the ordinary stop made by engineers the stop is sudden enough to make the rear cars bump up together. That was a cold morning; plenty of ice. There was ice on top of the cars. Those cars had been standing out in the weather all night, and I suppose they had ice on them; I did not go on top of *the* them. Ice
87 was on everything else. At the time Behymer fell the conductor was standing on the south side of the depot, on the north side of the track. I was on the ground by him, in front of the depot on the north side of the track. It is not a fact that the conductor was standing over there by the switch; he ran across the track as soon as he saw the man falling. It is about ninety feet from the switch to the depot. After this man fell the conductor went over there to where this brakeman was. He was not standing there by the brakeman when the man fell; he ran across to the opposite side of the track and hollooed and waived his hand up and down. That is the stop signal. The train was moving very slowly at the time; it was barely moving, and was moving east; it was just taking the slack out of the cars. The cars were moving east towards the depot. They were moving west before he was injured. The car that he fell off of stopped about twenty feet further east than where he hit the ground. When I saw him he was falling coming out from between the two cars. When I saw him he was falling out from between car 6500 and the next car east of that.

When the cars stopped this 6500 had moved on down about a half a car-length and he was lying about half the length of that car. In other words sixty-five hundred had moved down until he was lying just about opposite half way of the car. I saw Behymer when he first lost his balance. I think the action of the cars in running forward and bumping up together and then coming back had something to do with causing him to loose his balance, and the top of the cars, I think, had something to do with it. He was moving east at the time he lost his balance; was walking on top of the cars. I think the two rear cars in that string were to be cut loose and pushed back in on the main line. I think that was the object of pulling them out. I do not preserve a record of the list of the cars handed out to the train crew by which they do their switching. I do not preserve a copy of it. I give the trainmen the original and keep nothing in my office to indicate what has been done; I give it to the conductor. It is given to the conductor to go by in making up his train and in handling the cars. I suppose he makes a report of the cars handled by him at these different stations. All the records of handling of cars at the stations are not destroyed. I do not keep a copy of that switch-list before I hand it out; I just make out the list and hand it out to the conductor. The switch-lists are made up from that book Judge Duncan has in his hand and our waybills. Those checks indicate that the cars have been put on the switch-list.

88 Where there is no check it indicates that they are left where they are found. 7724 is checked and was to be moved. I don't know what was to be done with it; 287 and 6500 were to be moved; also 15906 and 10114, but I don't know whether they were moved by that train or not. We have two locals in the morning and both lists are made from that record. That check is made by the yard clerk or the bill clerk when he makes up the list. So I can't tell whether these were checked to be moved by this local train or not. This check-mark does indicate that it was to be moved either by the Texas and Pacific or the Cotton Belt.

Redirect examination:

There is no record made anywhere of how often a car is moved up and down the track in switching. What I mean by the switch-list is a list I give to the head brakeman or the conductor showing that certain cars are to be taken out by their train, or that certain ones are to be cut out and left there. There is no record made of the switching of the cars around in doing this work. Of the necessary moving of the cars in doing this switching there is no record made. If I have it on my switch-list that car 4499 is to be taken out and put in the train, it is left to the conductor and brakeman to do what switching is necessary to get that car out, and the amount of switching they will have to do to get that car out and put it in their train is to be determined by the situation of the car in the string of cars and where they want to put it in their train. In order to get that car out it may be necessary for them to go in and move the whole string of cars; and they may want to put it in some particular place

in their train and in order to do it it may be necessary for them to go up and down the track *and* half dozen times. What I mean by a record is the record we have of the cars that are moved from some other station and left there and cars that are moved out from this station. I do not mean that every time a car is moved on the side track it has to be recorded.

Cross-examination:

The records in my office will show which one of those cars went out with that Texas & Pacific train. I have not got those records with me. Those records would show which one of those cars were to be put in the Texas and Pacific train and be carried away.

89 Dr. B. F. EADS, witness for defendant, after being duly sworn, testified as follows:

I live in Marshall, Texas, and have lived there thirty-three years. I am a practicing physician, and have been for forty years. I am a graduate of the University of Pennsylvania, the old school. I am a surgeon. I have been connected with the Texas & Pacific Railway Company thirty years at least, in the capacity of surgeon and chief surgeon. They have a hospital at Marshall. I remember the case of Abe Behymer. I had occasion to examine and treat him. He was brought to the hospital on the 7th day of February, 1899. I remember the occasion of him being brought there. Dr. Taylor was my house surgeon. I found Behymer suffering with a compound fracture of the leg; what we term a compound fracture of middle third, fracture fibula middle third; that comprises both bones in the leg. A compound fracture means a complete fracture of both bones with an external wound communicating to the fractures. His leg was set first and placed in a plaster of Paris cast. He was admitted to the hospital on the 7th day of February, 1899, and left on the 26th day of June, 1899. His leg was kept in a cast for nearly two months. He was then examined, and I found partial union but not complete. The bones were in position; the edge of the bones had not become hardened. We then put the cast back on his leg, and told him he might get up and walk around on crutches, but to bear no weight on the leg. In a short time he wanted to go to Longview. We let him go with the understanding that he was to come right back. He continued to do that until the house surgeon told me that he was not doing so well. I told him to keep him there when he come back and let me see his leg. He telephoned me at my home and told me that the boy was there, but wanted to go back to Longview to attend a barbecue. He went back and I have never seen him since except in passing. He did not come back to the hospital any more; we sent for him several times; we thought we could make a good leg out of his leg. It was after June when he went to the barbecue; he left before June; he left there about two months after we had taken the bandage off. He was discharged from the hospital when we found that he was not coming back any more. It was on the third day of July that he wanted to go to the

barbecue; he would come back to the hospital about every ten days; his leg was doing well and not giving him any pain at all. I think after the third of July he did not come back to the hospital any more.

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90 He was never discharged from my treatment and care until we found we could not get him back to the hospital, and we then struck his name off the books; he was never permanently discharged, but on the contrary we tried to get him to come back. Under the treatment that we were giving him at the time, I have no doubt but that he would have had a good limb if he had remained in the hospital. I saw his limb when the plaster of Paris was first took off. I couldn't answer the question as to how long before he left the hospital and didn't come back any more since I had last seen him without bringing in the house surgeon. I did not see him when the plaster of Paris was finally discontinued. I saw him at the time it was first taken off and examined his leg, and found that it was doing very well then. There was a slight motion of the limb but I attributed that to the new bone. At that time the limb was perfectly straight and the same length the other one was.

Cross-examination:

That leg appears now to be at least two inches shorter than the other one; that may be caused by the bones having lapped over on the side and united. Plaintiff exhibited his leg to the witness, who had him to stand up.

Redirect examination:

There is a very great difference in the condition of his leg now and when he left the hospital. It was straight when he left the hospital; it was perfectly straight. The leg is crooked now. I attribute that crookedness and the knit-ing together in the way it has done to his throwing his weight on it in some way or the other, and leaving off the plaster of Paris bandage, in all probability. I think by the performance of the proper surgical operation that the leg could be reunited and made a good leg now. I think it can be done. The operation would be cutting down to the bones and preparing the ends of them so they would unite and place the limb in a similar condition to the one we put in at first. The limb can be straightened so he can use it. I consider the danger to his life in an operation of that kind, very little. There is a great deal of difference in performing a surgical operation on a young person and an old person. The younger they are the quicker they get well. I have performed operations of that kind, and have witnessed others perform them, all of them with suitable results. I never had one to lose their life; I can't recollect of any person ever losing their life by that operation. Of course, the meth-
91 ods and arrangements for surgical operations now are very much improved from what they once were, and

we don't have the same results that we used to; they get well without any sup-*aration*. As a matter of course, we couldn't set a definite time in which Behymer would have a good leg from that kind of an operation. I think six weeks or two months at most, would be sufficient to give him a good leg. Two or three months would be sufficient time. I could not tell you how many cases of surgery I have treated since I have been there in the hospital without referring to my books. We always have fractures in the hospital. We are hardly ever clear of a case, and sometimes we have five or six and sometimes more. I gave Behymer the same personal attention that I gave all the patients in the hospital while he was there. I go to the hospital every day about nine or ten o'clock. I practice medicine in the town, but I generally make my calls and get to the hospital as soon as I can. I am always there about eleven o'clock and pass through the wards. If any complaint is make I expect them to make it to me. I always ask them the question if their is anything they need or anything they want; that is my rule always. I know Dr. Bacon Saunders of Fort Worth. He is a physician and a surgeon. His reputation as a surgeon is good, no better.

Cross-examination:

Two months after the accident I saw this man's leg, examined it and saw the condition it was in. I found that it was in such good condition, taking in consideration the nature of the trouble, that we simply split the plaster of Paris cast on the leg, and after examining and seeing it was straight and everything in proper shape I could detect a little motion and said we must put that plaster back there, and we put it back and kept it that way. That was the last time I looked at his leg. He *come* (came) to the hospital on the 7th day of February; he left the hospital, that is we gave him permission to go around in the wards and in the yard, and then on the 26th of June he was marked off the books as he did not come back. It was two months after he *come* (came) to the hospital that I had the plaster of Paris took off his leg and examined it and had it put back. After that time I made no personal examination of his leg, but I could see that it must be in position by the shape of it. Dr. Taylor put the plaster of Paris on it. I did not help do it. I think he came there one night; at any rate I did not know he was there until I went to the hospital in the morning, and found
92 that he had put the plaster of Paris cast on the leg, and I examined it and it was in perfect shape. That plaster of Paris was not taken off and still another one put on. That remained on it until I looked at it and found that the bones were solidly united. It was cast in plaster of Paris only one time that I know of. That was split when I examined the leg. In other words, that same cast was put back on it; that is the way we generally do in all cases like that. That was the last time I saw and examined his leg. On the third of July when he left there I could see his leg when he was walking around there, and it looked to me like it was in proper shape. I am satisfied that his leg is not now in the same

condition that it was on the third of July when he left there, or when I saw him last before that, which was probably ten days or two weeks. His leg was encased in plaster of Paris. From February the seventh to July would be about five months. Ordinarily a compound fracture ought to heal in at least two months; at least it ought to be united in that length of time. At the end of about two months when this healing ought to have occurred I had the plaster split and noticed a slight motion there at the fracture. I thought that occurred by reason of the fact that the bony substance had not become hard. I don't know how long the second plaster of Paris cast remained on his leg; it was there the last time I saw him; that was just a few days before he left the hospital. He came back on the third of July, as I was told. I saw him from time to time, and he still had the plaster of Paris cast on his leg. The rules of the hospital permitted him to walk around with the plaster of Paris cast on. After the first examination was made he could go around on crutches, but could not use his leg. In order to perform that operation, that I spoke of, his leg would have to be cut into and the union that is now formed there torn apart, and then the ends of the bones will have to be so cut or scraped so they will unite. The leg is already short, and I think if that was done it would lengthen the limb. To perform that operation this man would have to be put under the influence of opiates. There is very slight danger in that. Occasionally the administration of chloroform has the effect of producing death.

Q. Is it not true that you cannot tell exactly what would have to be done to the leg or the bones of the leg as to how they would have to cut or how much taken off in the operation until the leg was cut into and opened up?

A. Of course, you would have to cut down there. In one sense of the word you might say it was more or less a speculative operation. I simply give it as my opinion that with this
93 operation his leg can be put in shape so he can use it; I think it can be done beyond a doubt. I do not know where Dr. Taylor is now; he is not working for the Texas & Pacific Railway Company now. I don't remember exactly how long he remained in the employ of the company. I think it was until November of last year. He was what I called the house surgeon; he resided at the hospital; I was the surgeon-in-chief, and lived up in town. I did an outside practice. It was the house surgeon's duty and business to give his immediate attention to dressing wounds in the hospital. The treatment of this man was left to Dr. Taylor just the same as all others in the hospital; the house surgeon is the chief man in charge of the patients day by day; I was chief surgeon and had supervision over the house surgeon. This man is not capable of using his leg in its present condition. The last time I saw his leg it was not then in shape to be used; I would have instructed him not to use it.

Dr. BACON SAUNDERS, witness for the defendant, after being duly sworn, testified as follows:

I live in Fort Worth, Texas. My name is Bacon Saunders, and my profession is that of physician and surgeon. Have been in the practice twenty-five years on the first day of next March. I have diplomas from the University of Louisville and New York Polyclinic. I am engaged in the practice at Fort Worth, and have a hospital there. I am connected with six different railroads there; the Texas & Pacific is one of them. I remember having occasion to examine Abe Behymer, the young man who had his leg broken on the Texas line, at Big Sandy. That was early in October, 1899, between the first and the middle of October. Mr. E. W. Campbell brought him into my office and asked me to examine him. Mr. Campbell is division superintendent of the Texas & Pacific Railway Company, and he brought the young man there for me to examine, and I made an examination of his leg. If I remember the fracture must have been somewhere about the middle third. I found the leg, I thought a little part of the leg swollen and somewhat discolored. The limb was somewhat curved and there was a slight movement between the ligaments of the leg-bone as I remember. My remembrance is that the evidence showed that the small bone of the leg was firmly united, and there was a limited amount of motion in the ligaments of the leg-bone. If I remember the fracture must have been somewhere about the middle third of the
94 leg. I have not examined that leg since that time; never saw him but that one time. My understanding was that he was brought there for me to examine him and give an opinion as to the condition of his leg, and what ought to be or what could be done to better the condition of it, and it was for that purpose that I made the examination of it. I talked with Mr. Behymer and gave him an opinion as to what I thought could be done with the leg. I told him that — performing an operation on the leg I thought it could be straightened. In the condition the leg was then the chances were exceedingly good, amounting almost to a certainty, that by the proper surgical operation the limb could have been straightened. I told him if he would go to my hospital I would use my best efforts to repair the loss, and that in my judgment his limb could be made a useful limb, a good, sound limb. I did not see him walk on the leg at that time; did not see him make any effort to walk on it. My remembrance is that he took my proposition under advisement, and was to let me know what he intended to do. I don't think he said he would or would not; he just took the matter under advisement, and that was the last I ever heard of him. I never saw him any more nor had any further communication with him. I have never seen him since that time that I know of. The operation for the restoration of a limb in that condition, where it had been united for that length of time, it would be necessary to cut down and expose the ends of the bones and freshen them up; sometimes we simply rub them together, sometimes we saw off a very thin slice, and sometimes we scrape them so as to vivify the ends of the bones; that is to freshen the ends of the bones in order to bring together

the fresh parts and fresh bone. After the bone has been broken for so long it will not unite without revivifying the ends of it; every bone must be vivified or freshened up before they will unite. That would require the administration of chloroform or ether in order to perform that operation. Cocaine is never used in an operation of that kind; it could be used, I don't think it would do. It could be injected into the limb and produced a deadening sensation at the point of injection. (Witness here examines limb.) The most noticeable thing I find about the limb now is that it is crooked inward at the middle third. I think there is slight overlapping of the broken fragments of the main bone of the leg from above downward, that is one part of the bone overlaps the other, passes by; it is slight, that is, it is not marked. I don't think there is any overlapping in the smaller or outward bone; it seems to
95 be reasonably well united. The circulation of the limb is very good; better than it was when I saw it before. There is a limited amount of motion between the ligaments of the leg-bone. It is not free motion at all; that motion is limited; it is a slight motion between the two ligaments of the fibula and knee-bone; there is probably some shortening due to the fact of the overlapping. I would say that the shortening is not very marked. I would have to have a tape-line in order to see how much shorter it is than the other one. I would say the shortening is not exceeding an inch, probably under an inch. That is not absolutely correct, but that is as near as we can get at it. In performing an operation to restore that limb we would have to rebreak both bones, scrape the ends of them, straighten the limb and then hold them together just like you would a new fracture. It would take about the same length of time as it would require on the original fracture. The limb can certainly be straightened. It is exceedingly probable that that limb could be straightened so that he would have a good limb. The probabilities are largely in favor of it. It is not absolutely certain, but it is an operation that I have done and seen done a great many times, and the results have always been favorable; I never did lose a limb of that character. That character of operation is not so dangerous to life as the amputation of a limb, simply because you do not touch the large blood-vessels. In amputation you have to cut the large blood-vessels, and there is danger of loss of life. In making this statement I take it for granted that a surgeon would do it that way, and there would be no large blood-vessels cut, and the only question would be infection of the wound. If the wound was not infected it would heal the same as any other fracture. I mean by infection of the wound getting dirt or something of that kind in it, anything that would prevent it from healing. On a man of his age the probabilities for the performance of a favorable operation are much better than on an older man. On a man of forty years I would have no hesitation of performing that kind of an operation. Anything above five and below forty or fifty we would have good results. At the time this young man came to me in Fort Worth my recollection is that I told him I was authorized to take him into my hospital and do what I could for him, without any cost to him.

Mr. Campbell authorized me to do that. He just said if the young man was willing to have anything done, to go ahead and do it. I understood that Mr. Campbell brought him to me; that is the way I understood it.

96 Cross-examination:

There was nothing said to me about Mr. Behymer releasing his claim against the railroad company for damages if they would have this operation performed for him. Mr. Campbell told me that if the young man came there to have the operation performed I was authorized to perform it. If the fracture is quite recent we would probably think it sufficient to rub the ends of the bones together; if the fracture was the second union it may become necessary to saw off the ends of those bones sufficiently to get down to live bones; saw it off or scrape it off. I don't think, in the condition the man's leg is in now and the slight overlapping of the bones, that it would be as short after that operation was performed as it is now. I don't think the amount of bone taken off would be noticeable. That is taken off just simply to revivify the ends of the bones. One-eighth of an inch does not make a bit of difference in the length of a man's leg, not a bit on earth. One-eighth or one-sixteenth of an inch off a man's leg does not make any difference. I am willing to say that there is not a man in this court-house who has two legs of the same length. Anything short of an inch does not make any appreciable difference in his gait. The ordinary height of a shoe heel is about half an inch. I don't know whether knocking your shoe heel off would make any difference in your walk or not. If a man's limbs are of different lengths they are so hung on the body that you will never notice it. I don't say that to have one leg shorter than the other is no injury to a man's physical condition, but I say it will be no special deformity to a man's gait. I don't think one-eighth of an inch off a man's leg is permanent injury to the man if his limb is healthy otherwise; if he walks perfectly its usefulness is not impaired or limited. My impression is that if the shortening is anything less than an inch you would not notice it, and he will be just as good a man. I never heard that a man could receive a severe shock from his shoe heel hitting upon the sidewalk, except from shoe manufacturers. If a man's leg is perfect in every other way a shortening of anything less than an inch will not make any appreciable halt in his gait; he can run as fast; he can walk as fast, and for all essential purposes, outside of the fact that one leg is shorter than the other, I can't see that it does any serious harm. There appears to be between half an inch and an inch difference in this young man's legs. If his leg was solid and straight, my opinion is that the leg would not be injured. If
97 his leg was just as short as it is now but was solid and straight there is not a man in Tyler that could tell that he had a short leg, and he would not know it himself unless some one measured it for him.

I don't think this operation that I spoke of is a dangerous oper-

ation; it is not a cheap operation; it is not a cheap character of work, because it belongs to a class of work that requires skill. It is not dangerous to life, but it is a serious operation from the standpoint of the limb. It is only serious from the standpoint that when a doctor promises a certain result to any broken bone it is always a serious question whether any broken bone will unite or not. Nature has certain functions to perform. When a man comes to me with a broken arm, I can't say to him that your arm will get well, but I can say to him that I will use my best efforts, and will keep it in line and keep it straight and if nature does her part of the work this bone will unite. It takes a fracture a long time to unite without the efforts of nature. Usually where we have to cut down into a wound and freshen the bones so as to make new bone matter to unite they are more rapid to unite than a new fracture. For instance, if you have an arm that has largely united and the bone is just forming into bone and you fall down and break it over, now it does not take that as long to unite as it did the original fracture. I am not able to tell you why that is so but it is true. Possibly that may be accounted for upon the ground that the fracture has already started to grow back. This leg, with the proper treatment, ought to have healed in from three to five months. At the end of five months without some accident, that bone ought to have reunited. If everything was in proper condition from three to five months would have been sufficient for this fracture to have healed. Mr. E. W. Campbell made the arrangements with me to examine this young man. He was present in my office during the examination. I couldn't say whether the statement I made to this young man with reference to my opinion were expressed in Mr. Campbell's presence or not. I don't think anything was said by Mr. Campbell when he brought this young man to me about him having presented and was intending making a claim for damages, but I anticipated a claim for damages as I have had a great deal to do with these things. If that was mentioned at all I don't remember it. I don't think it was mentioned to me; I have no recollection of it. I presume he was brought to me as the local surgeon of the Texas & Pacific Railway Company. There was nothing said about why he was brought to me. I have done a great deal of work of that kind, and I presume it
98 was because I do that character of work. I understood that— was examining him as an injured employé of the Texas & Pacific Railway Company, and examined him at the instance of the railroad company.

Redirect examination:

There may be an apparent shortening of the limb when there is really no difference in the two; it is what we call apparent shortening; you can shorten your own limb by making the muscles rigid. When you do that if you are behind a person looking at the spine you will notice that it makes a curve in the spine. It is fourteen and one-half inches from the most prominent point of the knee to the center of the ankle-bone. The source of error in makenig

measurements of this kind is putting your finger on the identical spot or part of the same bone. Whether one leg is shorter than the other depends on where you measure from. The other is fourteen inches scant and this is fourteen inches full. That is the inner side. This other leg will be a little longer; I can see that at a glance; that is fifteen inches from outside measurement as near as I can make it. There is practically no difference in the outside measurement of the two limbs. From the best measurement I can make the actual shortening is one-half inch. We have the two shortenings, the apparent shortening and the actual shortening; the same applies to the whole limb. As near as I can get at it the measurements I have made show the actual shortening between the two limbs.

Dr. A. B. TERRY, witness for the defendant, after being duly sworn, testified as follows:

I live in Longview, Texas, and have lived there all my life. I am a practicing physician; have been practicing since 1897 and 1898. I am a graduate of a medical school, Tulane University of Louisiana. I know the plaintiff in this case; have known him ever since he was a small boy; I reckon I am a little older than he is; have been knowing him probably twelve years. He received his injury while I was away at school. I think I saw him probably in the following April after he was injured in February; in April, of 1899. I had a conversation with him. Some time in April, I don't remember the exact date, but it was on Sunday evening, he was coming down the street in a buggy, and I was standing on the corner by Gans' store there in Longview, and he called me to the buggy and made an engagement with me to meet me in my office
99 Monday morning at ten o'clock for the purpose of examining his leg. He came up there on Monday morning, and I saw him and examined his leg. I found that both bones of the leg had passed beyond the ends of the bones; there were evidences that the leg had been broken. His leg was crooked. I made an examination of the leg and gave him an opinion in reference to it. He gave me a history of his case, not in the way he was injured but of his treatment, and said he wanted to be advised as to operating on it. He said at the hospital they wanted him to come back and let them treat him but he was afraid. I told him they could do it at the hospital as well as any one. He wanted to know if I could do it, and I told him I could, but at the present time I was not prepared to do the work. I advised him to go back to Marshall and let them treat him. He did not seem like he wanted to go back there. I said If you don't want to go back to Marshall, the railroad company will likely furnish you a pass to New Orleans, and I will go down there with you. He was carried away with the idea, and said he would make arrangements to go in about a month; time passed along and he never made any arrangements. Along then in the fall of 1899 I spoke to him about it, and told him that I would go down there with him; that there were several boys going from Longview to attend school, and I said You can go and have your leg operated on and you will have company. He said he

wanted to do that. He did not go, and from time to time I saw him and would speak to him about his leg, and he would say he was going, but he never did go. I believe it was just a little while before he brought suit I saw him one day, and asked him when he was going, I think that was last year, and he says, No, I have decided not to have it operated on. He just picked his foot up and kinder shook it at me, and says, I want to show that to a jury. He was speaking about his leg being hurt. He made that statement right in front of Seagall's market in Longview in my presence and also in my father's presence. We were going home late one evening. I told him to have that leg operated on as early as possible because nature would try to form a joint there; that the longer it stood in that condition membranous *issue* (tissue) would form out and do away with the firm joint which would surely be the case if he let it run on. On the morning when he had the talk with me there in my office he had a little cotton bandage on his leg; it was just wrapped around it. I took it off and fixed it back on. On that morning my condition as to sobriety was perfect; had not been drinking any at all. Did not drink any at that time. At
100 that time a man could almost guarantee a perfect union of that leg, that is there would be no more danger in that operation than it would to take off the tip end of any of a man's fingers. I practice medicine there in Longview and have been all the time since I began. I saw Abe very often on the streets there, walking around on crutches.

Cross-examination:

I think it was in April, 1899, when I first had this conversation with Abe. It was in less than a year after he was injured. This was in April following February when he was injured. If it was not in April it was the last part of March, but I think it was about the first of April. It was something like two months after his leg had been injured. There was no plaster of Paris on his leg then; I am sure of that; there was nothing but the bandage on it. At that time the big bone in his leg had overlapped. I mean by that that one bone had lapped over the other, and had begun to unite. It appeared to me at that time, and in my judgment, an operation on this boy's leg was necessary in order to restore it.

Q. And in your opinion could his leg be restored any other way than by an operation or rebreaking.

A. The leg would not have had to be rebroken; it was already broken. What I mean to say is to break the partial union that had started at that place and reset the leg and cause a new union. The leg might have been treated in this way. The operation I had in mind was to cut into the fracture, freshen the bones, set them and put them together in the proper place and fasten them there. I am local surgeon for the Texas & Pacific Railway Company at Longview, and have been since last fall. I was not local surgeon at the time I had this conversation with Behymer; it was merely a friendly conversation. Behymer might have been in the care of

the surgeon at the hospital in April, at the time I had this conversation with him, but I know he left the hospital and would come to Longview, and would go back to the hospital. I did not know he was still in the hospital and subject to their treatment. I don't know whether he went back to the hospital and they put another plaster of Paris cast on his leg or not. I don't know about the plaster of Paris; when he came to see me he did not have any plaster of Paris on it, and from that time he didn't have any more. His leg was then crooked. At that time the bones had passed each other; that was apparent to any physician who examined it.

Q. I will ask you if after you saw that leg in April, if that leg was again encased in a plaster of Paris cast in its then con-
101 dition without performing an operation, whether in your judgment that was proper surgical treatment or not?

A. A physician that had any knowledge of surgery at all would know that a leg being in that condition, plaster of Paris would do it no good, and I can't see why a physician would let a thing like that go on. If that leg was in that condition when plaster of Paris was put on it, it ought not to have been done. I say this, that if that leg was in that condition when plaster of Paris was put on it, it was not the right treatment, but these bones might have been in opposition; it is not every time that the bone is put in opposition every time it is set. It was not the proper treatment, in the condition this man's leg was in in April, 1899, when I saw it, to put it in plaster of Paris. At that time it was not proper, but upon the other hand I want to say this that that leg could have been in opposition, the bones together, yet the union of the bones might not have been perfect, and after the plaster of Paris was put on, still the union might not have taken place. I advised him that it was necessary to have an operation performed on the leg simply because he came to my office for advice. I gave him the proper advice. I explained to him the operation that ought to be performed; told him the leg ought to be cut into and the ends of the bones vivified so as to make new matter, and then set it and hold it in that position and let it grow back. That in my judgment was the proper medical treatment for that leg. I think it was some time about the latter part of March, or first of April when I saw him; I had just returned home from a course of lectures. That was not my first course of lectures; I was a post graduate. I told him I could perform that operation if I had the proper appliances. I had already been to New Orleans to attend a course of lectures. Tulane university is where I went to take lectures. I told him that the railroad company would furni[illegible]asses and I would go to New Orleans with him. They did not furnish me a pass then; he told me that he could get passes. I don't know the financial condition of Behymer; I don't think he is a man of any means; he depends upon his labor for a living. Later on he told me that he didn't have the money to pay for it, but he reckoned the railroad company would pay for it. I told him if the railroad company didn't pay for it that I could get him in the University hospital where he would have a good physician. Later on I told him I would carry him to New Orleans or St. Louis and have his

leg operated on; at that time I was employed by the railroad. I told him I would carry him to St. Louis or New Orleans before I was employed by the railroad as local surgeon; I was ap-
102 pointed local surgeon in the fall of last year. It was after I was employed as local surgeon by the railroad company that he told me he was going to save his leg and show it to a jury. At the time he told me he was going to show his leg to a jury I did not examine him; we were talking just a minute or two in front of the market; that is the only time he ever gave me a positive answer about having the operation performed on the leg.

I was not in the habit of drinking at the time this first interview occurred. It was not since that time that I have become addicted to the drinking of whiskey; I am not addicted to the habit; I take a drink of whiskey when I feel like it. I don't know whether it is a fact or not that my father has served notice in the saloon in Longview to prohibit them from selling me *shickey* (whiskey). I have not been so informed by saloon men over there. Possibly my father might have served notice on the saloon men in Longview not to sell me whiskey. I have been in saloons and got whiskey since that when I wanted it. I had one man to refuse to give me whiskey. I am of age, over twenty-one years of age. He didn't say that he refused to give me the whiskey upon the ground that my father had served notice on him not to sell me whiskey. He did not refuse upon the ground that I was a habitual drunkard. He just told me that he didn't want to sell me whiskey, that he thought too much of me. It was not on the ground that he didn't want me around his place of business; he is a friend of mine. I don't remember the date when that was; it might have been three months ago; it was after I had this interview with Behymer, and after I advised him to go to New Orleans. I know Dr. Eads of the hospital at Marshall. I have had no conference with Dr. Eads since I came over here; I have had a conference with him in reference to this injury to Behymer. I don't know that I told him in that conversation the condition of Behymer's leg when I saw him, but I was over at the hospital and talked about Behymer's leg. Was at the hospital in Marshall, and was talking to Dr. Eads there. I went over to the hospital and we were talking about Behymer's leg, and he told me the method of treatment which they gave him. They told me they had it in a fracture box first and then in plaster of Paris. I don't remember whether the house surgeon told me that they had kept his leg encased in plaster of Paris up to eight or ten days before the 4th of July. I think I told the house surgeon and Dr. Eads that the bones in this man's leg had lapped over each other in the last of March or April. They said it was his fault. I guess they knew it was in that condition when I saw it. I told them about the condition of it when I
103 saw it; I don't know that I told them when it was that I saw the leg; I don't know when I went over there; I think it was in 1899; that was before I was employed local surgeon by the railroad company. I did not go over there at their request. I did not just happen to make a visit over there. After I had exam-

ined this man I was talking to Mr. Chew, the claim agent for the Texas & Pacific Railway Company. Soon after I examined this leg the claim agent and myself had a conversation about it. I met him at the junction one morning and something came up about this matter. I never had known anything of Mr. Chew at that time, but he asked me if I had seen anything of Behymer, and I told him yes, and told him about the condition of his leg. I did not tell him that Behymer was at fault to cause his leg to be in that condition; I could not tell him that because I didn't know. I couldn't say whether the overlapping of the bones in Behymer's leg was on account of his fault, or whether the leg had not had proper treatment; I couldn't say whether it was or was not. Behymer told me the first time that it was constitution troubles that caused his leg not to unite. Behymer is not a physician. I don't know whether Chew was getting up evidence to pass on Behymer's claim or not. I just had a three or four minutes conversation with him. I understood at the time who he was. He just asked me if I had seen Behymer and I told him yes, that I had examined him. He didn't ask me then the condition of his leg; I think I told him. The reason I went to the hospital at Marshall was that later on I got a letter from the claim agent asking me to go over there and see what treatment they had given him. I don't know why he wanted me to go to the hospital and see what treatment had been given him. It is not true that when Chew came to see me I understood that he came as claim agent and representative of the railroad company getting up evidence to pass on Behymer's claim for damages. I did not understand that he wanted me to be a witness, and it is not true that I went to Marshall to confer with the doctors over there in order to become a witness. I never had any idea of becoming a witness. I was not representing Behymer; he did not ask me to go to Marshall and represent him in any way. I expected some compensation for going to Marshall and making this investigation. I expected to get pay for going over and seeing how Behymer's leg was treated; they never gave me any reason for wanting me to go over there. I did not have any idea why they wanted me to go at that time. Probably I went over there to acquaint myself with the treatment which they said they had given this man in order
104 to make a witness for the railroad company. I went over there and consulted with Dr. Eads and Dr. Taylor and had them to tell me what treatment they had given him; at that time I was contemplating becoming a witness in the Behymer case and expected pay for it. I did not get compensation for it. I have been appointed local surgeon for the railroad company since that time. I do not understand that that is my compensation. I did not tell Mr. Chew that I expected compensation; have never told any one that I expected compensation. I went over there at his request, thinking probably I would be favored some time by the railroad company. After that I made application for the appointment as local surgeon, and that is the favor that I have since received. I don't know that that had anything to do with my interest in the Behymer case. At that time I did not know there would be any

suit filed. I did not tell Mr. Chew about Behymer saying he was going to save that leg and show it to the jury; did not tell Dr. Eads or Dr. Taylor that, nor Mr. Campbell. I told Judge Duncan about it. I guess he had his claim at that time in the hands of his lawyers for the purpose of bringing suit I suppose. I think I told that to Judge Duncan the other day. I was talking to Judge McCord some time ago in relation to what I knew about this case. He met me on the streets here one evening week before last or last week, the first time he ever mentioned it to me, and I don't know exactly what passed between us, although he asked me if I had seen Behymer. He did not ask me to tell him all that Behymer ever said to me about the case and I did not tell him all. I did not tell him about Behymer saying he was going to save his leg and show it to a jury. I knew he was representing Mr. Behymer and I would be a witness for the railroad. Judge McCord knew that I was going to testify for the railroad. It was not necessary for me to tell him about this statement of Behymer's about saving his leg and showing it to a jury, and I don't think I told him that. Probably I never thought of it. I do not consider myself a biased witness in this case. I think I am purely impartial and unprejudiced in giving my opinion in this case.

Redirect examination:

Judge McCord has known me ever since I was a child; knows my father; knows that I am a physician, and knew that I was local surgeon for the Texas & Pacific Railway Company. He came to me and talked to me about the Behymer case. It is a fact that my father is a very strict temperance man, and does not want
105 his boys to go into a saloon at all. It is a fact that saloon men in Longview sell whiskey to a great deal of men of my age who drink more whiskey than I do. It is a fact that I got my appointment as local surgeon for the railroad through the efforts of my father through Messrs. Duncan & Jones, who represent the railroad down there at Longview.

J. E. Ferguson, witness for the defendant, after being duly sworn, testified as follows:

I was fireman on the train that morning when Abe Behymer was hurt at Big Sandy. We were pulling a string of cars out of the side track, and the conductor stepped over to my side of the track and gave the stop signal. The brakeman was fixing to cut off a car when he gave me the signal. After we had stood there for a minute I suppose, I said to the engineer some one must be hurt, and we both got over on his side of the engine where we could see around the curve, and a crowd was standing around some one, and we both walked back there to where Behymer fell. I help carry him into the house. I don't remember hearing anything right then about how he come to fall off the top of the car. After he was carried in the house he said he slipped and fell. He said something about having hung his pants on a nail. There was a torn place on the

bottom of his pants somewhere along there. That torn place was there after the accident. I do not know what leg it was on. It was a half an inch or maybe an inch long; it was something like an inch; I have not seen the pants down here, the pants he is supposed to have had on at that time. We stayed at the station there something like an hour. I supposed the train stayed there forty-five minutes after Behymer was hurt. I do not know what car he fell off of, only what I was told. I did not see him fall. I saw him on top of the car while we were on the side track before we pulled out; the other two brakemen were there; Stelson and Seay were the other two brakemen. Stelson was working on the front of the train and Seay was in the swing. Behymer was the rear brakeman. The cars that morning were encased with ice, sleet and snow. I suppose the ice was about a half an inch thick on top of the cars; I was firing the engine. It was not my business to go on top of the cars. I don't remember what time we left Longview, our time was 5.55, but I don't remember whether we left on time or not. We got to Big Sandy about 8.30 or 8.40. I can't say whether these are the same pants Behymer had on or not that morning. I don't remember the goods of the pants, whether they were the same as this or not. I did not help roll up his pants or cut them off. I was there a few minutes after the local surgeon attended him. I helped carry him into the waiting-room and stepped out. We had something like eleven or twelve cars in the string in pulling them out of the siding. I suppose we ran eight miles an hour in taking them out; possibly a little faster or a little slower. There was nothing unusual about the speed in carrying those cars out. There was nothing unusual in making the stop; we went on doing our work just the same as we did any other morning in running the engine and stopping. I did not see this man fall at all. I believe it was his right leg that was broken. I do not remember on which leg of the pants I noticed the torn place; do not know whether it was on the one that was hurt or not. I couldn't say how they were torn or how much they were torn, but there was a place torn like this in one leg of the pants. That, meaning the split in the leg of the pants cut by the doctor, is where the doctor split it. When we took him up from the ground I noticed the torn place in the leg of his pants like that at the bottom. I do not remember whether it was on the leg that was injured or the other leg. I am not working for the Texas & Pacific Railway Company now. Am working for the Texas & Sabine Valley as engineer; that is the road that runs south from Longview.

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DR. R. C. TAYLOR, witness for defendant, after being duly sworn testified as follows:

I was house surgeon at the Marshall hospital at the time Abe Behymer was brought there in February, 1899, for having a leg broken. I attended him, in conjunction with Dr. Eads, when he was first brought there. I am a physician of thirteen years' experience; am a graduate from Ann Arbor, Michigan, and of St. Louis, Missouri. I lived at St. Louis all my life. I stayed in the hospital,

at Marshall about two years and a half. I was house surgeon for the Texas & Pacific railway hospital at Marshall. I came from St. Louis to Marshall. My duties as house surgeon of the hospital at Marshall were to prescribe for sick and injured employés of the Texas & Pacific Railroad Company. I remember Abe Behymer's case. He came to the hospital on the 7th day of February, 1899, and we examined him thoroughly, and first gave him an opiate to relieve his pain; he was suffering intense pain from a fracture and bruises on the back, and we washed and dressed his leg.
107 He had a compound fracture of the left leg between the knee and ankle, both bones of the leg were broken. We washed and dressed his leg and bandaged it carefully and put it up in a fracture box. We allowed the fracture box to remain on about ten days or two weeks, dressing it every two or three days in the meantime. Dr. Eads was present at every dressing of Behymer's leg. Dr. Eads was aware of the course of treatment that was given Behymer, most of it being under his directions, in fact all of it. While Behymer was right at the hospital his conduct was all right, but he took several trips home and would overstay the time that Dr. Eads had allowed him to be away from the hospital. The doctor would allow him to be away forty-eight hours, and he would stay a week and sometimes two weeks, and he would use his limb, and I don't think he took proper care of himself. I talked to him about that several times. He was away from the hospital at least a half a dozen times, and would stay anywhere from four to five days to two or three weeks; one time he stayed at least a month. When he came back I had a talk with him about staying away so long. I remember when he finally left the hospital. I don't remember the exact time but I think it was about two and a half or three months after he first came there that he left the hospital. I remember one occasion when he came back to the hospital and I telephoned Dr. Eads. I advised Behymer to wait and let Dr. Eads examine his leg, that I would like to have Dr. Eads in consultation at that time; that the union was very slow and that I would much rather Dr. Eads should see it in conjunction with myself, and he said he had some business and that he could not wait, but would have to go back to Longview. That was the time he left the hospital. I wanted Dr. Eads to see the limb and examine it. He had not been taking care of the limb and it needed some extra treatment at that time, and I wanted to see Dr. Eads and get his opinion about it. He did not come back to the hospital any more after that. Behymer had a bad cold at one time, and also had a spell of malarial fever of about ten days' duration while he was in the hospital. I think Behymer received the proper treatment in every way while he was there in the hospital, at least he received the line laid down by the general writers on surgery and all authorities on surgery. That morning when he left the hospital I desired to call Dr. Eads' attention to the fact that the bones were at a tangent, and were not straight, which was due to defective union and to using the leg too much. The leg had a light papier maché splint on it at that time.

I had had the leg in plaster of Paris, and I told him to return
108 to the hospital in three or four days when he left the last time but he did not come back at all. I am now located at Palestine, Texas. Am in the International & Great Northern Railroad hospital at that place in the capacity of house surgeon. Dr. J. G. Jamison is chief surgeon. Behymer signed a statement about how he come to receive his injury while he was in the hospital. I filled out the statement, but it was his verbal answers to the questions reduced to writing, and he signed it. That is Mr. Behymer's signature. It is the custom of the Texas & Pacific hospital to take a report of every injury case that comes to the hospital. We do that in order to have a record of everything, and a copy of it is sent to the general office so they will have a record of it. I explained to Mr. Behymer that it was necessary for me to have a report, and he said he had no objections to making the report, and I asked him these questions that are in this form. I simply showed it to him and told him to read it over carefully, and he had it for probably six hours and then signed it. He was in bed at the time, lying down. That is a correct copy; it is just the same as this.

Cross-examination:

This young man's leg stayed in the fracture box ten days or two weeks; then it was put in a plaster of Paris cast. We left that cast on the leg probably three weeks. That cast was then taken off and the leg examined. The leg at that time seemed to be doing well; it was straight and no shortening. No lapping of the bones whatever. Another cast was then put on on account of the swelling going down. That cast was put on the same day the other one was taken off; he was still in bed. That cast stayed on the leg about the same length of time, maybe a week or two longer. I would say it stayed on about three weeks; that plaster of Paris was then taken off and we put on a bandage around it. I remember this young man to have gone home one time while his leg was in plaster of Paris; that remained on the leg about three weeks. The third plaster of Paris cast was put on his leg after the second one was taken off; that remained on there a little longer than the others did. The first I think stayed on about three weeks and the second about three weeks and the last one about four or five weeks, but we decided to open the last cast so we could take it off and look at the condition of the fracture, and left it open so we could tighten it as the swelling went down, so that the third cast stayed on his leg something like eleven or twelve weeks.

He went away and didn't come back — shortly after the last
109 plaster of Paris cast was taken off his leg. At the time he finally left the plaster of Paris cast had been taken off his leg finally, and a little splint put on it. That splint was composed of paper, pasteboard, etc. It was large enough to hold the fracture at that time for a short time. At the time the papier-maché splint was put on his leg was straight, and there was very little shortening. Hardly ever one leg is the same length as the other. He left the hospital with that paper splint on his leg, and we advised him to come back

two or three days afterwards; he went away and never come back any more. His leg was straight and there was no shortening at the time he left the hospital. It is not true that in April or the latter part of March of that year, and while he was still under my charge in the hospital, that at that time the leg was crooked and the bones were lapped over and the union of the bones had started where they had lapped. His leg was straight then, and was getting along in very good shape then. At that time we didn't think that it was necessary to have an operation performed on the leg. I don't remember the exact date when he did leave the hospital. I haven't got the hospital record. The last day that he was treated in the hospital would appear upon the hospital record book. We always keep a record of everything. It is a fact that the last time he was at the hospital was on the 3rd day of July, and he said something about going home on account of the fact of wanting to be home on the fourth of July. His leg was not in bad condition and did not need an operation in the last of March or first of April. It was not crooked at that time. The bones had not lapped at that time.

After we told him he could get up we furnished him crutches to walk around on; he didn't bear any weight on the limb though. It was intended for the leg to swing. It is necessary that the weight of the leg be down in order that it will straighten the leg out. I think Dr. Eads allowed him to go home to Longview on two or three occasions. He stayed longer than the time allowed him. On the 3rd of July, Behymer was not under our treatment; he had not been coming to the hospital for a month then, or six weeks, but when he came on the 3rd of July, I told Dr. Eads that Behymer had come back to the hospital. We never did discharge him from the hospital. We did not refuse him admittance when he came back the last time; we never refused him admittance at all. Behymer violated the rules of the hospital in overstaying his time. When he came back and wanted me to examine his leg, I made no objections whatever to examining it and treated it for him.

110 I made no complaint at all; I told him he had better take care of his limb, that he ought to come back to the hospital when we told him to. He would always overstay his time. Besides the wound on his leg he was suffering from a slight wound or bruise on the back. We rubbed liniment on the bruised place on the back. We examined it from time to time; there may have been a little discoloration there. He did not complain of it very much; he complained more of his leg; that on the back wasn't considered a serious injury; he never complained of it, at least he never complained of it to me only the first few days. My recollection is that Dr. Eads was present at every dressing of the leg. Behymer never asked me one time when I was dressing his leg if it was not crooked. His leg was always in proper shape when I dressed it; it was not crooked or overlapped; it was held in proper shape by reason of the plaster of Paris. Behymer's conduct was good while he was in the hospital; I know that he did not follow our instructions when he would go away from the hospital. I did not see him using his leg more than he ought to. I think the bad condition of

his leg now is on account of him having used it too much. That is my opinion from the condition of the limb. I did not see him use his leg too much, therefore it is an opinion of mine that the bad condition of his leg was from excessive use of it. He had not used his leg more than the hospital authorities permitted him to use it up to the last of March; he had been around the hospital up to that time. His leg was not in bad condition in the latter part of March or first of April. I say the bones were straight at that time.

ABE BEHYMER, plaintiff, recalled by defendant, testified as follows:

After I left the hospital at Marshall I never had any further surgical treatment of my leg. I did not have any doctor to treat it after that. I bandaged it myself after that. I had bandage and a wool stocking on it. I have not got the bandage on it now, but I have the wool stocking on it. I have never had any other treatment for it since that time.

Dr. BACON SAUNDERS, recalled by defendant, testified as follows:

The expense of an operation such as I described yesterday, that would restore this man's leg, would be as follows: The patient
111 would have to be confined in the hospital under hospital treatment say three months. Good hospital accommodations, private room, nurses' attention, etc., would cost about ten dollars a week. Something a little more elaborate would cost fifteen dollars a week, but you can get perfectly good hospital accommodations, such as the average people have, for ten dollars a week. That would be forty dollars a month, or about one hundred and fifty dollars for hospital expenses. The maximum fee for the surgeon in an operation like that for a man in good circumstances, two hundred and fifty dollars would be regarded as a good fee, total about $400.00.

WILLIAM SEAY, witness for the defendant, after being duly sworn, testified as follows:

I was connected with the train from which Behymer fell at Big Sandy on the 7th day of February, 1899. At the time Behymer fell I had come down off the same car he was on and was going up to the west end to cut the car off so Behymer could ride it down on the main line. I had been on top of that string of cars that morning. Just at the time he fell I suppose I was about middle ways of the string of cars on the ground. I was intending to cut that car off. I did not see him at the very moment he fell; after I had climbed down on the other side of the car, I never noticed him any more. I never saw him any more after I climbed down on the ground; I was on the south side of the train, and he was on the north side. I was there when the train pulled up; I suppose it pulled up at a speed of about six miles an hour, and the stop was made as usual. In making a stop on a grade like that, the cars run up against the engine, that is the slack would run up, and then the grade would carry the slack back out. I suppose between the two

couplings the slack is about four or five inches. I helped pick Behymer up, and carried him into the sitting-room of the station. Stelson, Key and I believe Mr. Williams, the agent there, assisted me in carrying Behymer into the station. The car inspector was also there. I do not remember whether Smith and Ferguson had gotten down there by the time we started to take him back in the depot or not. Of course, they came down after they found out he was hurt. I helped carry him into the station; I suppose I stayed there about five minutes. I was there when the doctor came in. I did not go back in there at all after I came out. I did not hear Behymer say anything in regard to the accident as to how it occurred.

Did not hear him say anything about how he come to fall,
112 nothing more than he just slipped and fell. I did not hear him say anything about having caught his foot or pants on a nail or anything like that. He did not say anything of that kind while I was present. We went on switching after the accident. I did not go back in the station any more before we left there. After he got hurt it left us short a man and I had to make couplings. Stelson was on the head end and I had to set the brakes on these cars to keep them from getting away from us, and that did not give me a chance to get back in there to see him before we left. I was there when the doctor rolled up his pants' leg. I did not notice any torn place on the pants' leg besides the place the doctor cut. I did not see anything the matter with his pants, nothing except where the doctor cut it.

Cross-examination:

My name is William Seay. I had been on top of some of the cars in that string before they were pulled out of the siding. I did not go up there at the direction of the conductor; I went up there to perform my duties as a brakeman. I let off some of the brakes, and then climbed down. I climbed down in order to be on the ground when they got out of the switch so that I could uncouple the cars. It was Behymer's duty to ride the cars out of the switch and be on top of them so he could set the brakes and control them as they went down the main line, which was downgrade. I had started at the hind end and had been over the whole string that morning. I got on at the rear end. There were ten or twelve cars in the string; there was more than six cars; I am positive of that from the length of the train. The last car in the string was a Southwestern box car. I know I left Behymer on the rear car when I climbed down on the ground; the very last car in the string towards the east. He followed me up off the tank car to get on the box car. The tank car was next to the last car in the string; we were both on the oil-tank car, and both went over that onto the next car. I saw him on the last car in the string; that was east of the oil-tank car. There was no car between the last car in the string and the oil-tank car; the tank car was next to the last one; I am sure of that. That is the car he was on when I saw him. I saw him on car 6500. That was the rear car, and the oil-tank car was next to it on the west. There was no other

car in the string east of 6500; that was the rear car. I suppose he was on the west end of that car when I last saw him. He had gotten up on top of the car and I suppose was there to ride it down after I cut it off. I had the switch-list. I was the man who had the list indicating
113 what was to be done. We were pulling out those cars to make the switch. We were going to put car number 6500 down on the main line; just that one car. The reason I cut off 6500 was that it was to go down in the train. My switch-list showed that; that is the reason why I went down and cut just below 6500 so that we would not pull out any more. I am positive about that. I am positive that my switching list called for us to pull out car 6500 and put it in on the main line. There was no other car below 6500 on that transfer track that I wanted to put on the main line; we brought out all we wanted. If he fell off of the rear end of car number 6500 he couldn't have fallen down between two cars, that is, if he fell from the east end of the car. If he fell off the west end of the car he was bound to have fallen down between the car and the tank car. I don't know where that switching list is; I suppose it is in the caboose; sometimes we hold them for reference. I hung it upon the file there in the caboose. That caboose is over on the Texas & Pacific railroad. I reckon I handled the caboose about four months, probably more than that. I don't know whether I worked on it that length of time or not. We just hang the list up there on the file and after we get so many we destroy them. I don't know whether I turned that switch-list in or not. We had to pull out the other cars in order to get sixty-five hundred out. We didn't pull any out below that, because we didn't need them. I was the man who was supposed to cut the cars off, but we never did cut it off. Car 6500 was coupled onto the car below it when it was on the transfer track. I think Mr. Key uncoupled it. Mr. Key was the conductor. 6500 was cut loose from the cars below it in order to bring it out on the main line. It is not true that there was another car below sixty-five hundred that was pulled out of the siding. It is not true that there were two cars below 6500 that were pulled out. I don't know how many cars were pulled out of the siding, but I know they pulled out down to 6500 and no further. Behymer was on 6500 when I last saw him, and the car immediately in front of it was the tank car. If he fell off the east end of the car he did not fall down between two cars, that is, between two cars that were coupled together. If he fell off the other end he must have fallen down between the end of that car and the tank car.

Redirect examination:

I did not see him fall off the car.

114 Dr. EADS, recalled by the defendant, testified as follows:

The railway hospital at Marshall is not a source of revenue to the railway company. The amount paid by the employés don't begin to keep it up; there is a deficit every month; that deficit is made up by the railroad company.

Cross-examination:

I am employed by the railroad company at so much a month to look after their hospital. Under their contract with the railroad company, and by reason of the taking out of a part of the wages of the employés by the company, each one of them is entitled to receive treatment at the hospital. There is no limit as to the time they are to receive treatment. If an employé is injured today and is carried to the hospital, and it becomes necessary for him to stay there a year to recover, there is no limit as to the time he can stay there. I employ the hospital officers; they are paid by the railroad company. The employés do not have anything to do with employing the surgeons that I know of. I employ the house surgeon and all others under me.

E. W. CAMPBELL, witness for defendant, after being duly sworn, testified as follows:

Questioned by Mr. JOHNSON:

I have heard one or two of the witnesses make remarks about this case since the trial began. I haven't been sworn in the case. I have talked about what my testimony would be. I have had a talk with our counsel as to the testimony of the witnesses in this case. I was just trying to think whether they told me what the others testified to or not; I don't recollect them telling me what the other witnesses said. I don't know whether I am as slow in operating the Texas & Pacific railroad and its business as I am in answering questions of counsel, but I am slow enough to know what I am going to answer to and to know whether it is correct or not. I think Judge Duncan told me that Behymer had sworn to things not so; I don't think he told me what they were. He did not tell me what had been sworn. I think he told me that Behymer had sworn that he caught his pants on a nail, and that that wasn't so. He did not tell me that one of the employés had testified that Behymer said that at Big Sandy. I have been a witness before, and know what putting the witnesses under the rule means.

115 Direct examination:

I know William Seay of the Texas & Pacific railroad. I know two or three Fergusons. I know a man by the name of C. A. Smith. I know J. A. Key who was conductor on the Texas & Pacific road; I know H. A. Williams, the agent at Big Sandy; also know Stelson the brakeman. I have not talked to any of those men since I have been here about the facts in this case. I do not know anything of my own knowledge in regard to how Behymer got hurt at Big Sandy; I was not there. I know nothing of that at all, except from the reports I received about it. What I heard in Judge Duncan's office was because of my presence there while they were talking about the case. That is all I have heard. I came over here day before yesterday on the 2.30 train. I know Abe Behymer. I only met

Behymer since I have been here down there on the streets and shook hands with him, and asked him how he was getting along. I took Abe Behymer to Fort Worth to see Dr. Bacon Saunders. I commence- working for the Texas & Pacific Railway Company in October, 1873. I am now division superintendent for the Eastern division, and have been since June, 1897. After Behymer was hurt, I went to the hospital to inquire about him every once and awhile, or would inquire about him over the telephone. He came to my office to see me and we had a talk in regard to his leg; that was in the month of July, 1899; I don't recollect just what date it was, but I think it was in the latter part of July, 1899. I talked to him and then went and called Dr. Eads up over the 'phone and told him that Mr. Behymer had been to see me. It ran along for several days until along in September, I think it was, and I saw Behymer and he said he had been over to see Dr. Eads and that Dr. Eads said he could fix that leg and make a good leg out of it and have it knit together. He said he didn't like to go to Dr. Eads. I says Abe, Dr. Saunders has got the name of being as good a surgeon as there is in this part of Texas, and I will take you up to him and let him examine you, and if he can make a good leg out of that, he knows what he can do and he will tell you. He will tell you whether he can make a good leg or whether he cannot. In October he went to Dallas to the fair for a couple of days, and then he went to Fort Worth with me. I was up there looking after the fair travel. Abe and I went up to see Dr. Saunders, and Dr. Saunders examined his leg, and after he examined the leg, he says I can very near guarantee you a good, sound limb, but says You will have to go under treatment. Abe asked if that leg
116 would be shorter than the other, and Dr. Saunders said it would be a little shorter, but not short enough so that any one would detect it in your walking. Dr. Saunders was there in the office by himself when he made this examination, and he says, Abe, you come up this afternoon and I will have my partner, Dr. Thompson, to examine this leg with me, and we will all see what is the best to be done. I said, Doctor, I can't come back this afternoon; I have to go back to Dallas to see the travel out this afternoon. Abe walked down as far as the depot with me, and I said, Abe, you go back there this afternoon and let them examine you; I said I can't go with you, but they will examine you and tell you just what they will do. I left Fort Worth and came back to Dallas; then I went back to Fort Worth that night on number 5. I used to get the people out of Dallas in the evening and went to Fort Worth to get them out of there in the morning. I next saw Abe in Dallas a day or two after that; I remained in Dallas all during the fair. I don't remember having any talk with Abe about going to the hospital subsequent to that.

J. E. FERGUSON, recalled by the defendant, testified as follows:

I was on the stand this morning. A short time after this accident I made a report of it, which report is signed by me. The re-

port must have been made up just as well as I knew. If I remember right I dated the report the day the accident happened, but it was made out a few days afterwards. That report was made to Mr. Addis, he is superintendent of the motive power. I can't say positive whether the report was made out to Mr. Campbell or to Mr. Addis. I would recognize that report if I were to see it. I said this morning that I remember to have heard Behymer say after we carried him in the station that something caught his pants or foot, whether it was a nail or something else I don't remember. I couldn't say what he said. I remember him saying that something caught his foot, but I don't know what it was. As well as I remember he said something about stepping on a nail. I don't remember having heard him say any particular thing caught his foot. I remember seeing his pants torn after the accident happened. I looked at that tear and I remember that the tear was horizontal. I don't remember in which leg of the pants it was. I understood you to mean perpendicular when you said horizontal, and answered the question that way. That was the tear I
117 remember in the pants. I have never had any talk with Mr. Behymer about his case at all. I talked to Judge McCord at Mr. Behymer's house one time. I don't remember when that was; it has been several months ago; it was at George Behymer's house. I went up there because I was asked to come up there; I believe Mr. Behymer came by and asked me to come up there. I don't remember whether it was Abe or not. It was in the evening after supper after I came in. We did not particularly talk about this case when I got up there. There was one or two questions asked me about the case. I don't know Mr. W. L. Chew. He never did see me and have a talk with me about this case. I don't remember that he saw me last August in Longview and asked me what I knew about this case. I was working for the T. S. & V. at that time. I do not know Mr. Chew personally.

Q. I suppose he is a man about forty-five years old, rather tall, not heavy built, black hair, a mustache, and is working for the Texas & Pacific Railway Company in the capacity of claim agent?

A. I don't remember him. He never did see me and talk with me about the facts of this case; never did that I remember of.

Q. Did you in last August have a talk with him, or did he not approach you and ask you what you knew about the facts of the accident to Abe Behymer, that he knew you were fireman on the train, and did he not ask you if you saw any defect about the car off of which Behymer fell, and you told him you saw no defect; and didn't he ask you or tell you that it was claimed by Behymer in his suit that there was a nail caught his pants on the top of the car and asked you if you knew anything about that, and you told him you did not?

A. I don't understand you. If he ever said anything to me I don't remember it. Of course I don't remember answering any questions that I don't remember being asked. I did not state to Mr. Chew about last August that I saw no defect in that car. I did not tell him that I heard nothing about a nail on the car. I don't know

that I ever told that to any one. I did not tell him that Behymer said nothing of his pants being caught on a nail. I did not tell Chew at the time referred to that Behymer said nothing or that I heard him say nothing at Big Sandy station about his pants being caught on a nail. I did not state to him that everything was covered with ice, and that the accident was caused by the cars
118 bumping together and being covered with ice. I made no statement at all to Mr. Chew; never did make any statement to him that I remember of, or to any one else whose name I did not know. The only statement I remember making was to Mr. Addis. I made no verbal statements to him or any one else. I made no such verbal statements to Mr. Chew at that time or place, and never have made any such statements. I was in the office of Duncan & Jones upon yesterday or day before yesterday. I don't remember any questions being asked me about this case while there. I believe I was asked where I was working up here a while ago. I think I have a good memory. I was asked no questions either by Mr. Jones or yourself concerning my knowledge of the facts of this case, that is not to me personally. I believe I was asked if I was still in the employ of the Texas & Pacific, and I told you I was not. I remember that now. I was not asked to give my statement as to what I knew about the facts of this case; I stated nothing to you all about what I knew about the facts of this case. I did not make any statement at all concerning the facts up there in the office. Day before yesterday, while in the office of Duncan & Jones, I was not asked by either one of counsel representing the railroad company as to whether anything was said by Behymer at the time he was hurt there and while in the station as to how he come to fall off the top of the car. I heard you asked one or two of the other boys something like that. I did not take it that it was to me, at least I didn't answer it any way. I remember hearing you ask the car repairer something about a nail. I don't think I was asked what I did that morning, whether I came from the engine and helped carry him into the station. I was not asked what I did when the accident happened. I told you this morning that I came back from the engine to where the man was lying, and help- carry him into the station. I did not tell you that down in the office. I was not asked the direct question as to whether I heard anything said about a nail being on top of that car. You did not ask me at the close of a conversation if I was the man who had the wreck over on the T. S. & V. where so many people were hurt. I did not tell you that I was the man and that I was the engineer on the train on which the people got hurt. I was the man and was the engineer of that train. I have no idea where you got the information that I was the man and the engineer of the train. I might have given
you that information in answer to a direct question, but I
119 don't remember it. I don't remember you asking me if I was running on the T. S. & V. and I told you that I was the man who had the wreck. I live next door to Mr. Behymers. We are friendly. Sometimes it is a week between the times I see George and the boy. Our families neighbor with each other. I went up

there that night and found Judge McCord there when I got there. I did not know what I was going up there for.

That is the report I made of this accident; that is my report. In this blank here where it says, "What did the injured person say was the cause of the accident, and the extent of the injury," I entered, "Says he fell from top of car." I do not see anything in this report about him having said his foot caught on anything. I didn't think it was necessary to embrace that in my report. The blank there says, What did the injured person say, and I put in there, Says he fell from top of car. I took it for granted that that was all that was necessary. I did not put in there that he said his foot caught on something. I remember hearing him say that his foot caught, or he stumbled some way. You might have asked me day before yesterday when I was in your office, if I was the engineer on the train that was wrecked a week or so ago. I remember you asking me about our wreck down there, but as to asking me that question I don't remember that. I remember you saying something to me about that, but we were not in that same room. Not in the same room in which you ask- us boys about the case, I mean the other boys; we were out of that room when you asked us about the wreck. When you asked me the question this morning, you did not say anything about any particular room, but just said in our office. I don't know why I didn't remember before dinner that I told you that. Since I have thought of the matter, I believe you mentioned the wreck. I don't remember what was said about it between us; you asked me about it; something was said about the wreck a day or two ago. I do not remember what I told you; you asked me something about the wreck, but I do not remember what I told you. I might have told you that I was the engineer on the train at the time. I do not remember that I told you that I was engineer on the train that was wrecked. I do not remember that you asked me where I was working. I believe I did tell you I was working for the T. S. & V. I do not remember that you asked me in what capacity I was working, and I told you as engineer. I remember you having said something about the bad wreck we had down there a day or two ago, but I do not remember telling you in that conversation that I was engineer on that train. I do not remember
120 anything else that was said on that particular occasion by us.

I do not remember any conversation you had with me concerning my knowledge of the facts in this case. I told you this morning that after I found out what was the matter, I got down off the engine and went back to where this young man was lying. I believe I told you that in your office day before yesterday. I helped carry him into the house. I couldn't say whether I told you I helped carry him in the house or not, when down there in your office. I went in the house with him and stayed there about five minutes. I believe I did tell you that down there in your office. I now remember that you had a conversation with me in your office regarding the facts of this case. I remember that now. I did tell you before dinner that I didn't remember it, but I now remember that I had a conversation with you in your office day before yester-

day concerning the facts of this case and my knowledge of the facts. You asked me those two questions. I couldn't say that you asked me to tell you all I knew about the facts of this case. I cannot say that you did not ask me such a question. In that conversation in which I purported to tell you the facts within my knowledge concerning this case, I did not tell you that I heard Behymer say that he caught his foot on something. I did not tell you at your office when you were conversing with me about the facts of this case, that I observed any torn place on Behymer's pants. I never at any time made any such statement to any of counsel for defendant in this case before I made it on the witness stand this morning. You did not ask me in that conversation in your office as to whether I heard Behymer say anything about being thrown off the car by his foot being caught on a nail. I did not say anything to you about it. You did not ask me any questions in reference to what Behymer said there after he was picked up about his foot or pants catching on a nail. I don't think you asked me any questions as to what Behymer said. You did not ask me whether I heard Behymer say anything while I was there at the station with him. You did not ask me that. You did not ask me there in your office whether or not I observed any torn place on the leg of his pants. I did not tell you that I observed any such thing. I told you that I didn't hear him say anything about the nail, if I told you anything. I did not answer a question as to whether I observed any torn place in the leg of his pants; you did not ask me that question, and I made no answer to a question of that kind. You did not ask me the question, in your office, as to whether I heard him say anything about his pants having caught on a nail or something. I
121 remember hearing you ask one of the other boys that question, but I was not asked that question, and did not answer it. I did not answer the questions when you were talking to the other boys. I *ould* (would or could) have given you all the facts I knew about this case if you had asked me about them. I have lived where I am now living three years on the first of March. I live about fifty yards from George Behymer's place; it is the next house to mine; I am friendly with their people; visit them and they visit my house; I have never talked with George Behymer, the father, about this case. The mother has asked me a question or two about the case. She did not say anything to me about the torn place in the leg of the pants. I have never talked to Abe about it. That night I went up there when Judge McCord was there, he asked me one or two questions about the case, and I gave him the same answers that I gave Mrs. Behymer. I have never disclosed to any one what my knowledge of the facts were until this morning.

Cross-examination:

I know John Howard, one of the lawyers in this case. I have never had a conversation with him at all. I never had a talk with you in my life. I do not know Mr. Edwards; have never had any conversation with Mr. Edwards. I have not talked

with Judge McCord since I came here to court to attend this trial. In the conversation I had with Judge McCord he did not ask me anything about what Behymer said there at Big Sandy as to how he was hurt. He simply asked me to tell him what I saw. I told him that I did not see him when he fell off of the car, and did not know what car he fell off of, and did not know how he come to fall off. The plaintiff in this case, his father or mother, his lawyers nor any one else have ever asked me to testify anything with reference to catching his foot upon a nail. No one connected with this defense so far as I know, knew that I was going to testify to that. I know Mr. Lige Campbell; he lives in Marshall.

The defendant having moved the court to continue or postpone cause in order for it to procure testimony of Dr. Dial and Chew, plaintiff and defendant then agreed as follows:

It is agreed between counsel for plaintiff and counsel for defendant that the witness J. E. Ferguson stated, about September, 1900, to W. L. Chew, claim agent of the Texas & Pacific Railway
122 Company, in regard to this case, that said Ferguson saw no defect about the car from which plaintiff fell, heard nothing at the time of the accident, or while at Big Sandy on that occasion of a nail or anything else having caught the foot of plaintiff at the time he fell off the car, and that Behymer said nothing about any nail or anything else catching his foot or pants on the car. And that the said witness Ferguson told said Chew in the same conversation that he did not observe any tear or torn place on the pants of plaintiff at or after the time of the accident.

It is further agreed between counsel for plaintiff and defendant that Dr. Dial of Big Sandy was present in the depot at Big Sandy at the same time with Ferguson, while plaintiff was lying there, after the accident, and that said Dr. Dial attended plaintiff, and that plaintiff said nothing to Ferguson or any one else in the hearing or presence of Dr. Dial in regard to having caught his pants or foot on a nail or anything else on top of the car.

Judge JOHN M. DUNCAN, witness for the defendant, after being duly sworn, testified as follows:

I want to make a statement in regard to the conversation I had with the witness Ferguson, who was on the stand this morning. He was up in our office on day before yesterday, reported there, and I had a conversation with him and with other witnesses, and I asked him in regard to his knowledge of the facts of this case. I questioned him in regard to what I thought was material facts, and among other things I asked him if he heard anything said by Behymer on that occasion in regard to his foot or pants having been caught on top of the car, and he said he said nothing of the kind that he heard. I also asked him, and the other witnesses, if he observed any torn place in the leg of his pants; he said he did not; and in that same conversation and at the close of the conversation I asked him who he was working for, and he said he was working for the T. S. & V., and that wreck came on my mind and I asked him if he was in

that wreck, and he said he was on that train; he said he was the engineer.

Cross-examination:

At the time I put him on the stand, I knew that he had told me he was in that wreck. I did not understand at the time I put him on the stand that he lived close to George Behymer. I found
123 that out afterwards. I understood that he was not in the employ of the Texas & Pacific Railway Company. I may have asked a general question to two or three of the witnesses, but what makes me know that I spoke to Ferguson was the fact that he was in that accident. I don't remember whether there were any other witnesses there at the time or not. There may have been one or two of them in the room at the time. I think the conversation in which I asked him about the wreck was the same conversation in which I asked him regarding the facts of this case. I know I took the witnesses one at a time and asked them questions as to their knowledge of the facts of this case, because there is no way of getting at what a witness will testify to except by asking the direct question. I never knew Ferguson before; don't know that I ever met him before.

Plaintiff's Rebuttal Testimony.

Plaintiff offers in evidence the American table of mortality, showing the life expectancy of a man twenty-four years of age to be 39.49 years.

F. J. McCORD, witness for the plaintiff, after being duly sworn, testified as follows:

In the conversation I had with Ferguson at Behymer's house in reference to what he knew about this accident, I did not ask him anything that Behymer said as to how the accident occurred. I have never requested Ferguson to so testify. I never talked to him as to whether he knew anything about what Behymer said, and did not know he was going to testify to it on the witness stand. I only had two conversations with him, one down at George Behymer's house, and the other Tuesday, when he came over here.

Cross-examination:

I had a conversation with Ferguson on Tuesday. I understood him to say this morning that he did have a conversation with me on Tuesday. It really wasn't a conversation; it was only about ten words; just about ten words I spoke to him down there.

The plaintiff, Abe Behymer, instituted this suit in the dis-
124 trict court of Gregg county, Texas, and the cause was duly and legally removed therefrom to the United States circuit court for the eastern district of Texas at Tyler by The Texas & Pacific Railway Company, defendant.

The court then charged the jury in the case as follows:

Charge of the Court.

GENTLEMEN OF THE JURY: This is a suit brought by Abe Behymer against the Texas & Pacific Railway Company, alleging substantially, that on the 7th of February, 1899, he was in the employ of the defendant as brakeman, and was injured while in their employ, at Big Sandy, by falling from one of their freight trains or cars.

He alleges as grounds of negligence on the part of the defendant that the persons in charge of said car or train of cars negligently moved or stopped the cars causing a sudden jerk, or sudden stop, and he was thrown from the car. He also alleges in substance that there was a nail on the passway on top of the car on which his pants were caught, causing him to fall; also that he was ordered by the conductor to go upon these cars and perform the acts of a brakeman. That it was negligence so to do. These are the substantial allegations, not in detail of course, but the substantial allegations that he alleges against the defendant. He also alleges in consequence of said injury that he is permanently injured; his leg was broken, and that his injuries are permanent, and asks for damages, etc.

The defendant has answered by a general denial of all the allegations in plaintiff's petition, alleging also that if plaintiff's injuries are of the character stated, that they were in such condition by reason of the fact that the plaintiff would not receive medical attention, which, if he had received and observed, his limb would not have been permanently injured. They also deny all the acts of negligence on their part, both as to the action of the conductor and engineer. Also charge that they had used diligence in inspecting their train and cars, and in fact it amounts to a general denial of the allegations of negligence alleged or charged by plaintiff.

As to the ground alleged in the petition in regard to the act of the conductor, after hearing all the evidence in this case, you need not regard that in your consideration of this case. That matter will not be submitted to you, and is withdrawn from you; you need not consider it at all. Therefore, the two grounds of negligence left in the plaintiff's petition is the charge that he makes of negligence in the handling of the train, sudden stopping and sudden jerking, by which he says he was caused to fall; and the charge that there was a protruding spike in this passway on which he walked as brakeman, on top of the car.

Under the Texas statutes, in the operation of a train, the parties operating a train are not fellow-servants, and therefore a party not guilty of negligence himself and injured by the negligent act of others in the operation of a train would not be debarred from recovery upon the ground of fellow-servants, that is, if he is otherwise entitled to recover, he is entitled to recover under the Texas statute.

Therefore, you will consider, (1) was the plaintiff hurt by any negligence of the parties in charge of the train. His allegations are that by the sudden starting and stopping of the train that he was thrown from this car and injured. It was the duty of the parties in

charge of the train, in moving it, to use ordinary care in its handling. By the term ordinary care is meant that degree of care and caution that a person of ordinary prudence, under the same circumstances, would use, an ordinar-y prudent man would use under the circumstances. There has been considerable proof in this case that this particular car or train of cars was moved and stopped as freight trains are ordinarily moved and stopped. Upon that question it might show that the care required by law was used, or it might not show the care. The question for you to determine is, under the facts of this particular case and under all the evidence introduced, did the parties in charge of the train use ordinary care in handling it, in so far as their duty required to avoid injuring any one; that is, did the operatives in charge of the train as to starting it or stopping it, use the degree of care that a person of ordinary prudence would use in that business under the circumstances. If they used the degree of care that an ordinarily prudent person, that is a person of ordinary prudence, under the circumstances, would have used, then the ground of negligence would fall, and plaintiff would not be entitled to recover upon that ground. But if from the evidence you find as a fact that ordinary care, as has been defined to you, was not used by the parties in charge of the train, and that the plaintiff was injured in consequence thereof, without contributory negligence on his part, he would be entitled to recover.

Therefore, gentlemen, it is one of the disputed questions of fact in this case that you are to determine from all the evidence offered both by the plaintiff and the defendant, applying the rule that I give you in charge as the law of the case. That is, if from
126 the evidence it appears that the parties in charge of the train used ordinary care, as defined, that is the care that an ordinarily prudent person under like circumstances would have used, then, even if plaintiff was hurt by the movement of the train, if the moving was done in the manner an ordinarily prudent person would have done, then he cannot recover. But if they failed to use ordinary care, as defined, that is such care as an ordinarily prudent person under the circumstances would have used, and the plaintiff was, without his fault, injured, he can recover.

Upon the question of the protruding spike, you are to determine from all the evidence, first, whether or not the spike protruded, and if you find there was no spike or nail there, it is not necessary to consider that question further, but if you find from the evidence that there was a protruding spike or nail on this running board on top of the car, you are to determine from the evidence whether or not it contributed to plaintiff's injury.

You understand, gentlemen, that the defendant is charged with the duty of inspecting its trains in order for the safety of its employés. It is charged with that duty. But if you find from the evidence that a spike did protrude, and the defendant exercised care in the inspection of its train, but that the protruding nail was of such character that inspection would fail to discover it, why upon that ground alone the plaintiff could not recover; but if it was such a thing that an inspection would have discovered its presence, why

then it would have been an act of negligence not to have discovered it, and if plaintiff was injured in consequence thereof, without his fault, he could recover. It is difficult for me to get to the minds of the jury exactly the legal idea meant. Now the parties having the supervision and control of moving cars is charged with the duty of inspection to see that those cars are in proper order, to be handled so as not to injure their employés. They are not insurers; they don't insure anybody that they will not be hurt, yet they are charged with the duty of inspection, of using reasonable care to ascertain and remedy defects or anything of that kind from which an injury might happen to an employé, therefore in this case the defendant was charged with the duty of inspecting these cars, and if an inspection would have failed to have discovered this nail or its existence, then it would not be ground for recovery by the plaintiff; but if an inspection would have discovered the presence of that nail, by which it could have been removed or driven in, then the failure to discover it would be an act of negligence that would entitle
127 the plaintiff to recover, if he was injured in consequence of that nail without any fault on his part. That like the other question, is a question of fact for you to determine from all the evidence offered in this case, applying the general principles that I give you in charge to the question.

A person entering into the employ of a railroad in the capacity of brakeman, assumes certain risks. He assumes the risks that are incident to the employment. In other words, that employment is dangerous from the nature of it. A person is liable to get hurt. A party entering that employment, and is injured while in the employment, he is debarred from a recovery in the event he is injured, except where he can show by the evidence that it was due to no act of his, but was the result of negligence of other parties. It might be that the master, as we speak of the owner of the railroad, the master might be negligent in failing to furnish him with the proper train upon which to work. In a case of that kind, the failure of the master to do a positive duty or perform a positive duty, or at least to exercise supervision to see that it is done, not that he insures that the cars will be in perfect condition, but he is charged with the duty of using care in the inspection. If he discharged the duty of inspection, but the defect was of such character that it failed to be discovered in that event, if the duty has been performed, and yet the master has been overlooked, and the employé is hurt in consequence thereof, he could not recover. But if the master had failed to perform the duty, or if he had performed it in such manner that the defect should have been discovered and the employé is injured in consequence of that, he can recover. The limitation upon this question of assumed risk by a party entering the employ of a railway company goes to the extent that if the employé is injured without his fault and by the negligence of others that are not fellow-servants (and I have charged the parties operating this train, under the Texas statutes, were not fellow-servants), he can recover. Therefore, if you find from the evidence that the plaintiff was injured by the negligence in the

manner in which the train was handled, and he was injured without his fault by reason of the manner in which they were handled, he would be entitled to recover; or if from the evidence in this case you find that there was no negligence in the manner of handling the train, but you find that the plaintiff was hurt by reason of the protruding nail, in order for the plaintiff to recover you must further find that the inspection or the manner of the inspection on the part of the defendant, as I have defined to you, had not been exercised. What is meant is, that if you find that they were
128 not negligent in regard to handling the train, although he may have been injured, if then you are to determine whether or not the nail protruding was the cause of the accident. If it did, then the plaintiff's right of recovery would depend upon whether he was negligent himself, and whether the defendant had been careless or negligent in the inspection.

If the defendant used care in inspecting its cars to discover anything of this kind and failed to discover it, then, although it was there, and plaintiff was hurt in consequence thereof, he could not recover because they don't guarantee them against injuries; but if they had used care in the inspection of the car, then you are to determine was it one of the contributing causes to the plaintiff's injury without his fault. If you find it was, then he would be entitled to recover upon that ground. If you find that the defendant was not negligent in the manner of handling its trains, and that the nail did not exist in fact, or if the nail did protrude, and that the defendant had used care in inspecting its cars and had failed to discover its presence, you will find for the defendant in this case. Those are the disputed questions of fact so far as the question of the right to recover or not recover, as joined between these parties.

It appears from the evidence in this case that at the time this accident occurred, that the car was covered with ice, and the defendant's contention is that the plaintiff went on top of this car, and while the train was being properly handled, that owing to the fact that there was ice on top of the car that plaintiff slipped and fell, and that is the cause of the accident. Upon that phase of the case you are instructed that you are to determine from all the evidence what caused the plaintiff to fall. If he fell because of the condition of the top of the car, and that the car was being handled with the degree of care that an ordinarily prudent person would handle a car, and that he slipped and fell on account of the condition of the ice, and that was the cause of the fall, the plaintiff would not have a cause of action, and you will find for the defendant. In other words, you must determine from all the evidence that the cause of the injury to the plaintiff was due, without fault on his part, to the want of care of the defendant in handling the cars, or on account of the protrusion of the nail, or both of those grounds, under the limitations and instructions I have given you. But if from the evidence he has established either negligence in the handling of the car or the protrusion of the nail, and his injury is in consequence
129 thereof he would be entitled to recover unless you find from the evidence that the defendant has used that care in the inspection of its cars as stated.

If you find for the plaintiff in the matter, the amount that you are to award him as a verdict in this case, you have a right to consider his age, the amount of money he was earning at the time of his injury; you have a right to take into consideration the probable duration of life; you have a right to consider physical and mental suffering that he has experienced in the past and may experience in the future, and taking all these conditions together, award him such a sum of money in cash as will reasonably compensate him for the injuries sustained. No definite fixed rule can be laid down, but those are the elements that the jury regards in awarding damages.

In regard to the question of his injuries being permanent or temporary, the contention is that he failed to submit to medical treatment or surgical treatment, and was negligent in his own conduct by which his leg was prevented from being cured of its hurt, either cured in whole, or placed in far better condition than it now is. Upon that question you are charged that it was the duty of the plaintiff to use the care that a reasonable prudent person would have used in order to have his injury healed. It was his duty to submit to all reasonable medical or surgical treatment that a reasonably prudent person would have submitted to, and therefore if you find for the plaintiff you are to determine whether or not he has used the care that a reasonably prudent person would have used in order to have had his wounds healed. If he did use such care, that is the end of it. If he failed to use such care, and you find from the evidence that by having used such care that his injuries could have either been cured or could have been remedied, the rule is this: If they could have been cured in toto, his recovery would be limited, if otherwise entitled to recover, to the original injury and the mental and physical suffering and loss of time up to the time that his injuries should have healed by proper care. That is the case where it is a total cure. But if you find by proper care that his injuries could not have been totally cured, but could have been ameliorated or made better, then in estimating damages you could only estimate damages for the original injury, the physical and mental suffering and loss of time up to the time such treatment would have partially restored it and any reasonable amount for the rest of his life; in the event you find it was permanent. What I mean is this, gentlemen: That if by submitting to proper surgical treatment his leg could not have been totally cured, but
130 could have been made much better, then in estimating the damages you base it upon the improved condition of the leg and not upon its present condition; in other words, upon the basis of the condition of the limb if proper care had been taken. As stated, if it was a total cure, you can allow only for the injuries up to the time it could have been cured, and to that point only, but if it could not have been totally remedied or cured but partially remedied, why, then you will only assess it upon the basis of the condition of the limb if proper care had been used in order to cure it. Upon all these questions you are to determine from all the evidence in this case. If you believe from the evidence in this case that the plain-

tiff by having submitted to a surgical operation that his leg could have been made a good leg, then it was his duty to do so, provided a man of ordinary care, under the circumstances, would have done so. Now, if a man of ordinary care would have done so, and you find from the evidence that it would have made a sound leg, you don't estimate damages on the leg he has, but on the leg he would have had if he had submitted to such operation, but if you determine from the evidence, as a matter of fact, that an operation would not have cured the leg, but would have bettered it, and you determine the fact further that a man of ordinary care would have resorted to that course, then you do not estimate damages for the plaintiff upon his present condition, but upon the condition of the limb he would have had if he had followed that course. Of course if you find he was injured without his fault, and that a man of ordinary care and prudence would not have taken a course different from the one he has taken, then you are allowed to consider his leg in its present condition, but these are questions of fact for you to determine.

There are a great many special charges asked, gentlemen, several of which I will give. I think they have been substantially covered in the main charge, but for fear they have not been covered, I desire to give them. The court gives special charge No. 14, special charge No. 13; charge No. 13*a*; charge number 10 is given with qualifications; charge number 5 and 7 are given. Charge No. 6 is given with a qualification; charge number 3 is given with a qualification; and charges numbers 9 and 11 are given with qualifications. Charge No. 2 is given with qualification.

In giving these special instructions, they are as much the law of the case as the main charge. I think substantially the instructions asked by both sides were given in the main charge, but for
131 fear they may have been overlooked they are repeated. They constitute part of the charge of the court.

In this case if you find for the plaintiff the form of your verdict will be, "We, the jury, find for the plaintiff, Abe Behymer, against The Texas & Pacific Railway Company, defendant, and assess his damages at so many dollars." If you find for the defendant, the form of your verdict will be, "We, the jury, find for the defendant, The Texas & Pacific Railway Company." You are to select your own foreman. Defendant having called the court's attention to the fact that he had omitted to charge on contributory negligence, the court then instructed the jury as follows:

"You are instructed, gentlemen, that the burden of proof in this case rests upon the plaintiff to establish his cause of action. The defendant also pleads in *their* answer that the plaintiff was guilty of contributory negligence by which he was injured, in defense. By contributory negligence is meant the doing of an act that a man of ordinary prudence and caution would not have done under the circumstances, which contributed to his injury, or it consists in the failure to do an act that a man of ordinary care and prudence would have done under the circumstances. It means that if the plaintiff was negligent and the defendant was negligent, no recovery can be

had. It means that the defendant must have been negligent and the plaintiff not negligent."

Counsel for defendant having called the court's attention to the following language in the general charge: "Therefore, if you find from the evidence that the plaintiff was injured by negligence in the manner in which the train was handled and he was injured without his fault by reason of the manner in which *they* were handled, he would be entitled to recover." The court then charged the jury additionally as follows:

"In order for the plaintiff to recover on the manner of moving the train, the evidence must show that it was handled negligently by those in charge of it, and in consequence of that the plaintiff was injured."

The defendant then and there in open court, before the jury retired excepted to the charge as follows:

(1.) To all those parts of said charge wherein the jury are told, in substance, in regard to the degree of care required of defend-
132 ant's agents and servants in moving the freight train from which plaintiff fell, that they must have exercised that degree of care and caution that a person of ordinary prudence, under the circumstances, would use under the circumstances, and that the question was, Did the parties in charge of the train use ordinary care in handling it in so far as their duty required, to avoid injuring any one; that is, did the operatives in charge of the train in starting and stopping it, use the degree of care that a person of ordinary prudence would use in that business under the circumstances. The ground of the exception was as then and there given, that the true question was and the true rule is, Was the train or string of cars and locomotive, at the time plaintiff fell therefrom, being operated in the usual and ordinary way of handling freight trains and in switching cars, and was the jerk, bump or jar any greater than is ordinarily incident to the handling of freight cars and trains in switching; and that if the train and cars were so operated and the plaintiff was injured thereby, then as a matter of law it was one of the risks he assumed upon taking employment as a brakeman, and he could not recover.

(2.) The charge limits the question of persons of ordinary prudence, when it should be as to whether engineers, conductors and trainmen ordinarily and usually handle trains in the way that train was handled at the time of the accident.

(3.) To that part of the charge on the law of contributory negligence, because the court failed to instruct the jury that if plaintiff's negligence contributed in any degree to the accident and injury, he could not recover, even though defendant be negligent.

(4.) To the whole of the charge, because the court failed to instruct the jury therein upon the issue made in the case by the pleadings and upon which there was evidence, to wit: that if plaintiff knew the tops of the cars were covered with ice and were dangerous to brakemen going on top of same, prior to the time he went on top of the cars, then he was not bound to go into such a place of danger, and it was incumbent on him to use that high degree of care, if he

had such knowledge or notice, for his safety, commensurate with the known dangers to be encountered; and that if he failed to do so and was injured thereby, he would be guilty of contributory negligence and could not recover.

After all the evidence was introduced and the argument of counsel for both parties concluded, the defendant requested the court to charge the jury as follows:

"Upon the law and the facts in the case, plaintiff is not
133 entitled to recover, and you are instructed to return a verdict for the defendant."

The court refused to give this peremptory instruction, to which the defendant then and there in open court excepted, before the jury retired; and after the court had given its main charge to the jury, in open court before the jury retired, the defendant by attorney requested each of the following special charges, Nos. 2, 8, 12, 13*b* and 15, to wit:

No. 2. "You are further charged that if you believe from the evidence, that by proper surgical treatment and attention, and by proper conduct and submission to treatment on the part of the plaintiff, his broken leg could have been restored to soundness, then he would not be entitled to recover any damages against defendant, even if the defendant was guilty of negligence, as defined in the general charge, beyond an amount sufficient to compensate him for the loss of time, and mental and physical pain, during the time it would have required to restore his leg to such sound condition."

No. 8. "You are further charged that all the evidence in this case concerning the nature of plaintiff's injury to his leg, and the proper and necessary treatment thereof, is to the effect that by proper surgical and medical treatment his leg could be and could have been restored to a condition of usefulness and soundness. It is further in evidence without contradiction that plaintiff was solicited by the surgeons in defendant's hospital, and by Dr. Saunders, a surgeon at Fort Worth, to submit himself to such treatment, and that he was requested by Dr. Saunders, who testified that he is the local surgeon of defendant at Fort Worth, to enter his hospital and receive there surgical and medical treatment for the restoration of his leg, and that plaintiff declined to take such surgical and medical treatment and attention, and it is further in evidence by the plaintiff himself and without contradiction that he has had no medical attention or care for his leg since he left the defendant's hospital at Marshall, and you are further instructed that the plaintiff cannot recover any damages he may have suffered by reason of the injury to his leg or for any permanent impairment of his leg, beyond an amount that would reasonably compensate him for the mental and physical suffering immediately caused by the injury to his leg, during the time in which it might have been restored by proper medical and surgical attention and treatment and for any other injuries, if any, he may have suffered from the original accident, that he could not recover damages for that unless you believe from the evidence, under the inst-uctions heretofore given you, that the company, its
134 agents or servants were guilty of negligence as defined to you, in causing the original accident and injuries."

No. 12. "You are further charged that it is a matter of common knowledge that freight trains cannot be, and are not usually moved or stopped with the absence of jerk or jar characteristic of the movement of passenger trains, and that in moving freight trains there are necessarily jerks and jars, caused from the taking up and running out of what is called 'the slack,' and if you believe from the testimony that plaintiff's injuries were caused by his fall from the car, caused by taking up or running out of the slack, and that such was no greater in degree than is ordinarily incident to the starting and stopping of freight trains, and that plaintiff's fall was caused by this in connection with the slippery character of the top of the car, then you are instructed that these were risks assumed by the plaintiff, and he cannot recover for any injuries occasioned thereby."

No. 13*b*. "You are further charged that the uncontradicted evidence in this case is that the string of cars from which plaintiff fell was being, at the time of the accident, operated and stopped in the usual mode and manner of operating and stopping freight trains, if, therefore, you believe from the evidence that plaintiff's injuries, if any, were caused by the manner of operating and stopping the train or string of cars then plaintiff cannot recover in this case."

No. 15. "You are further charged that if you believe the nail, if any, protruding from the running board was there, because the car inspector did not properly inspect and repair the car, and plaintiff was injured thereby, then you are instructed that said car inspector was a fellow-servant of plaintiff, and he cannot recover."

The court refused to give each and all of the five special instructions requested by the defendant, to which refusal and each of them the defendant by attorney then and there in open court excepted, before the jury retired.

After the court had given its main charge to the jury and before the jury retired the defendant by attorney, in open court requested each of the following six special charges, Nos. 9, 11, 10, 3, 4 and 6, as follows:

No. 9. "You are further charged that in taking employment, a brakeman assumes all risks necessarily incident to his employment, and if you should believe from the evidence in this case that plaintiff was injured by being exposed to the risks necessarily incident to his employment, he cannot recover."

135 No. 11. "You are further charged that where one voluntarily enters into a contract of hiring with a railway company, and assumes all the risks and hazards ordinarily and usually incident to such employment, he will be presumed to have contracted with reference to such risks and hazards."

No. 10. "You are further charged that plaintiff does not allege in his petition any negligence on the part of the defendant company in allowing its cars to become coated with ice and sleet, and if you believe from the evidence, that plaintiff was injured in consequence of slipping or falling by reason of the snow, ice or sleet on top of the cars, then plaintiff cannot recover for any damages he may have received by reason of the fall."

No. 3. "You are further charged that if you believe from the

evidence that the present condition of plaintiff's leg was caused by improper treatment, or want of attention, on the part of surgeons, then you are charged that the defendant is not liable for any damages caused by such condition, although you may believe from the evidence the defendant, its agents or servants were guilty of negligence in causing the injury, as defined in the general charge."

No. 4. "You are further charged that if you believe from the evidence that the cars from which plaintiff fell were covered with sleet and ice, and that that fact was known to plaintiff, and if plaintiff knew that walking upon the cars in that condition was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon the top of the cars, and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their condition made it dangerous to him in moving the cars, he will be held to have assumed the risk of all such danger, and if his injuries were caused by such condition of the cars, moved in the ordinary and usual way, and stopped in such way, he cannot recover for any injuries occasioned thereby."

No. 6. "You are further charged that it was and is the duty of the plaintiff to take such measures, and submit himself to such medical treatment and care as would lessen the injury or damage to him, if any, and if you believe from the testimony that the present condition of the plaintiff's leg is caused by his own negligence or carelessness or by failure to follow the directions of his medical attendants and advisers, and by failing to submit himself to the proper and necessary treatment of his leg and that otherwise his leg could have been restored to a sound condition, or the damage or injury repaired to any extent, then he cannot recover damages against defendant for any condition of his leg, or *from* any
136 want of healing or repair of the injury caused by such conduct on his part."

The court refused to give each and all of the said six special charges requested by the defendant in the language and form as requested, to which refusal and each of them the defendant by attorney then and there excepted, in open court before the jury retired.

The court then gave said six special charges with the interlineations, erasures and qualifications noted below; and which were made by the court:

Special charges 9 and 11 above were, upon request of the plaintiff's attorney, qualified by the court as follows:

"In connection with special charges No. 9 and 11 of defendant, the plaintiff asks the court to instruct the jury: That while the employé assumes the risks ordinarily incident to his employment, he does not assume the risks incident to his employment which may be occasioned or caused by the negligence of the other employés operating the train."

Special charge No. 3 above was qualified by the court at the request of plaintiff's attorney as given, as follows:

"Plaintiff asks that, if this special charge be given, it be qualified or explained as follows: But in such case, though you may find that

the plaintiff's injuries as they now exist, may have been caused by failure to give him proper treatment or want of attention on the part of the surgeons, yet he can recover for all the injuries occasioned by the original accident, and all the damages that he may have suffered or may hereafter suffer as the direct and proximate result of his said original accident, as may be shown by the testimony, provided the defendant company is liable at all under the charge of the court."

Special charge No. 10 above was qualified by the court as given, and at the request of plaintiff's attorneys, as follows:

"Plaintiff asks if this charge be given that it be given with this qualification: 'Provided his injuries were not caused by reason of the negligence, if any there was, of the employés operating the train.'"

Special charge No. 4 above was given with the interlineations and erasures made by the court as appears in the following copy of the charge, with the interlineations shown *if* (in) parenthes*is* and the erasure shown in the brackets:

"You are further charged that if you believe from the evidence, that the cars from which the plaintiff fell were covered with sleet and ice, and that that fact was known to plaintiff, and if plaintiff knew that walking upon the cars in that condition was dangerous, then, although you may believe from the evidence
137 that he was told by the conductor to go upon the top of the cars, and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their condition made it dangerous to him in moving the cars, he will be held to have assumed the risks of all such dangers, and if his injuries were caused by such condition of the cars, [moved in the ordinary and usual way and stopped in such way] (and not by the negligence of those operating them, if any,) he cannot recover for any injuries occasioned thereby."

Special charge No. 6 was given by the court with the interlineations made by the court, which interlineations are shown in parenthes*is* in the copy of the charge below:

"You are further charged that it was and is the duty of the plaintiff to take such measures, and submit himself to such medical treatment and care as would lessen the injury or damage to him, if any, and if you believe from the testimony that the present condition of the plaintiff's leg is caused by his own negligence or carelessness or by (his negligent) failure to follow the directions of his medical attendants and advisers, and by (negligently) failing to submit himself to the proper and necessary treatment of his leg, and that otherwise his leg could have been restored to a sound condition, or the damage or injury repaired to any extent, then he cannot recover damages against defendant for any condition of the leg (brought by any negligence of his own, if he has been negligent,) or for any want of healing or repair of the injury caused by such conduct on his part."

To which interlineations, erasures and qualifications, and each of them as made by the court and given, as above set out in said

special charges, the defendant then and there in open court, before the jury retired, excepted and also excepted to the refusal of the court to give each of said special charges as requested by the defendant, and without interlineations, erasures and qualifications.

The court also, at the request of the defendant, gave to the jury the following special charge:

No. 5. "You are further charged that if at the time plaintiff fell from the top of the defendant's cars, he knew, or by the use of reasonable diligence could have known that the tops of the cars were covered with ice, and that such condition was dangerous to persons walking or working on top of said cars, then he will be held to the use of such care and caution to avoid injury to himself, commensurate with said condition, and if he failed to do so and was thereby injured, he would be guilty of contributory negligence, and he cannot recover damages against defendants for his injuries,
138 even though you should believe from the evidence that defendant, its agents and servants were also guilty of negligence contributing to the accident and injury."

No. 7. "You are further charged, that if you believe from the evidence, that after plaintiff left the hospital at Marshall, a surgical operation could have been performed, or can now be performed, which would or would have restored his leg to its former condition of usefulness, and that a reasonably prudent person would have submitted himself to such operation and the treatment afterward, then the plaintiff would not be entitled to recover any damages of defendant, beyond an amount that would reasonably compensate him for any impairment of the leg, if any, which remain after such operation and treatment, and beyond an amount which would reasonably compensate him for loss of time and mental and physical suffering arising from the original accident as the direct result thereof, though you should find that there was negligence on the part of defendant, its agents or servants, causing the original injury, and that plaintiff was free from contributory negligence, as defined in other parts of this charge."

No. 13*a*. "You are further charged that it is the duty of the railway company to use reasonable care in the inspection of its cars, and if you believe from the testimony that such care was used in the inspection of the car from which plaintiff fell and that the damage, if any, was such under the circumstances as to be overlooked in the exercise of reasonable care and caution, and that it was the cause of plaintiff's injuries, then plaintiff cannot recover in this case."

No. 14. "You are further charged that if you believe from the evidence that there was a nail protruding from the running board of the car from which plaintiff fell, and that the cause of his falling or slipping from the car was caused while the train was being operated in the usual way, and from slipping on the ice on the top of the car, and that the nail, if any, so protruding from the running board caught his pants' leg while slipping, and in the act of falling off the car, and that he would have fallen from the car had the nail not caught his pants, then such nail cannot be considered the proxi-

mate cause of his so falling, and plaintiff could not recover on the ground that the nail caught his pants."

Because the above and foregoing matters do not otherwise appear in the record in this cause, they are here set forth in this bill of exceptions, which it is prayed the court allow and approve and that the same become a part of the record herein.

DUNCAN & JONES,
Attorneys for Defendant.

139 The above and foregoing bill of exceptions is hereby agreed to be true and correct.

JOHNSON & EDWARDS,
JOHN B. HOWARD, AND
F. J. McCORD,
Attorney- for Plaintiff.

Allowance of Bill of Exceptions.

The above bill of exceptions has been agreed upon as correct by counsel for the respective parties to the suit and the same is found correct by me and allowed and approved, and ordered filed as a part of the record in the case.

This 13th day of February, A. D. 1901.

Witness my hand and scroll for seal.

D. E. BRYANT,
Judge Presiding on the Trial of said Cause.

(Indorsements:) No. 2405. U. S. circuit court for the eastern district of Texas. Abe Behymer *vs.* Texas & Pacific R'y Co. Bill of exceptions. Filed February 15th, 1901. C. Dart, clerk by D. W. Parish, deputy.

Petition for Writ of Error and Supersedeas.

Filed February 11th, 1901.

In the Circuit Court of the United States in and for the Eastern District of Texas, at Tyler.

ABE BEHYMER
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 2405.

Petition for writ of error and supersedeas.

To the honorable the judge of the circuit court of the United States for the eastern district of Texas:

Your petitioner, The Texas & Pacific Railway Company, respectfully shows to the court that Abe Behymer recovered judgment against the Texas & Pacific Railway Company for damages for personal injuries, in the circuit court of the United States for the

eastern district of Texas, at Tyler, Texas, on January 11th,
140 1901, for the sum of ten thousand ($10,000) dollars and all costs of suit, because it shows that in the record and proceedings, as also in the rendition of the verdict and judgment therein in this cause, manifest error has happened, to the great damage of your petitioner, as by its complaint appears, and that forty days was allowed by said court after the entry of the order of allowance to have allowed, perfected and filed the bill of exceptions, and that your petitioner herewith presents said bill of exceptions and an assignment of errors, and prays your honor to grant and allow a writ of error to it to carry the case to the United States circuit court of appeals for the fifth judicial circuit, to revise the errors had in said cause in the court below; and your applicant further prays for a supersedeas on said judgment and that the amount of the supersedeas bond be fixed.

Respectfully submitted,

DUNCAN & JONES,
Attorneys for the Texas & Pacific Railway Co.

(Indorsements:) No. 2405. In U. S. circuit court, eastern district of Texas. Abe Behymer *vs.* The Texas & Pacific Railway Company. Petition for writ of error and supersedeas. Filed February 11th, 1901. C. Dart, clerk, by D. W. Parish, deputy.

Assignment of Errors.

Filed Feb'y 11th, 1901.

In the Circuit Court of the United States in and for the Eastern District of Texas, at Tyler.

ABE BEHYMER
vs.
TEXAS AND PACIFIC RAILWAY COMPANY. } No. 2405.

Assignment of errors.

Now comes the defendant, The Texas & Pacific Railway Company, by its attorneys, and shows that in the record and proceedings in the above-entitled cause there is manifest error, and it respectfully assigns the following errors, to wit:

First. The court erred in refusing to charge the jury as requested by the defendant, as follows:

"Upon the law and the facts in this case, the plaintiff is not entitled to recover, and you are instructed to return a verdict for the defendant."

141 Because (1) plaintiff assumed the risk by exposure to which he was hurt, in accepting employment as a brakeman; and (2) there was no credible evidence to warrant a verdict for the plaintiff; (3) because plaintiff was guilty of contributory negligence, and upon all the evidence, was not entitled to recover.

Second. The court erred in its main charge to the jury in the following portions thereof:

"It is the duty of the parties in charge of the train, in moving it, to use ordinary care in its handling. By the term ordinary care is meant that degree of care and caution that a person of ordinary prudence, under the same circumstances, would use; an ordinarily prudent man would use under the circumstances. There has been considerable proof in this case that this particular car or train of cars was moved and stopped as freight trains were ordinarily moved and stopped. Upon that question it might show that the care required by law, was used, or it might not show the care. The question for you to determine is, under the facts of this particular case and under all the evidence introduced, did the parties in charge of the train use ordinary care in handling it, in so far as their duty required to avoid injuring any one; that is did the operatives in charge of the train as to starting it or stopping it, use the degree of care that a person of ordinary prudence would use in that business under the circumstances. If they used the degree of care that an ordinarily prudent person, that is, a person of ordinary prudence, under the circumstances, would have used, then the ground of negligence would fall, and plaintiff would not be entitled to recover upon that ground. But if from the evidence you find as a fact that ordinary care, as has been defined to you, was not used by the parties in charge of the train, and that the plaintiff was injured in consequence thereof, without contributory negligence on his part, he would be entitled to recover.

"That is, if from the evidence it appears that the parties in charge of the train used ordinary care, as defined, that is the care that an ordinarily prudent person under like circumstances would have used, then even if plaintiff was hurt by the movement of the train, if the moving was done in the manner an ordinarily prudent person would have done, then he cannot recover. But if they failed to use ordinary care, as defined, that is such care as an ordinarily — person under the circumstances would have used, and the plaintiff was, without his fault, injured, he can recover.

"Therefore, if you find from the evidence that the plaintiff was injured by the negligence in the manner in which the train was handled and he was injured without his fault by reason of
142 the manner in which they were handled, he would be entitled to recover.

"If he fell because of the condition of the top of the car, and that the car was being handled with the degree of care that an ordinarily prudent person would handle a car, and that he slipped and fell on account of the condition of the ice, and that was the cause of the fall, the plaintiff would not have a cause of action, and you will find for the defendant," because the question was, and the true rule is, was the train at the time plaintiff fell therefrom being operated in the usual and ordinary way of handling freight trains, and in switching cars; and was the jerk, bump or jar any greater than is ordinarily incident to the handling of freight cars and trains in switching. If not, it was an assumed risk. And because said

quoted passages limit the inquiry as to persons of ordinary prudence, when it should be as to whether engineers and train operatives ordinarily and usually handle trains in the way that one was handled at the time of the accident.

Third. The court erred in the following part of the main charge:

"The defendant also pleads in their answer that the plaintiff was guilty of contributory negligence by which he was injured in defense. By contributory negligence is meant the doing of an act that a man of ordinary prudence and caution would not have done under the circumstances, which contributed to his injury, or it consists in the failure to do an act that a man of ordinary care and prudence would have done under the circumstances. It means that if the plaintiff was negligent and the defendant was negligent no recovery can be had. It means that the defendant must have been negligent and the plaintiff not negligent." In failing in this passage, as well as the entire charge to instruct the jury that if plaintiff's negligence contributed in any degree to the accident and injury, he could not recover, even though defendant had been negligent.

Fourth. The court erred in its main charge in failing to instruct the jury upon an issue made by the pleadings, and upon which there was evidence, to wit: that if plaintiff knew that the tops of the cars were covered with ice and were dangerous to brakemen going on top of same, then he was not bound to go into such dangers, and it was incumbent upon him to use that high degree of care for his safety commensurate with the known dangers to be encountered, and that if he failed to do so, and was injured, he would be guilty of contributory negligence, and could not recover.

143 Fifth. The court erred in refusing to give defendant's requested special charge number 2, as follows:

"You are further charged that if you believe from the evidence that by proper surgical treatment and attention, and by proper conduct and submission to treatment on the part of the plaintiff, his broken leg could have (been) restored to soundness, then he would not be entitled to recover any damages against defendant, even if the defendant was guilty of negligence as defined in the general charge, beyond an amount sufficient to compensate him for loss of time, and mental and physical pain, during the time it would have required to restore his leg to such sound condition."

Sixth. The court erred in refusing to give defendant's requested special charge number 8, as follows:

"You are further charged that all the evidence in this case concerning the nature of plaintiff's injury to his leg, and the proper and necessary treatment thereof, is to the effect that by proper surgical and medical treatment, his leg could be and could have been restored to a condition of usefulness and soundness. It is further in evidence without contradiction that plaintiff was solicited by the surgeons in charge of defendant's hospital, and by Dr. Saunders, a surgeon at Ft. Worth, to enter his hospital and receive there surgical and medical treatment for the restoration of his leg, and that plaintiff declined to take such surgical and medical treatment and

attention, and it is further in evidence by the plaintiff himself and without contradiction that he has *has* (had) no medical attention or care for his leg since he left the hospital of the defendant at Marshall, and you are further instructed that the plaintiff cannot recover any damages he may have suffered by reason of the injury to his leg or for any permanent impairment of his leg, beyond an amount that would reasonably compensate him for the mental and physical suffering immediately caused by the injury to his leg, during the time in which it might have been restored by proper medical and surgical treatment and attention and for any other injuries, if any, he may have suffered from the original accident, then he could not recover damages for that unless you believe from the evidence under the instructions heretofore given you, that the company, its agents or servants were guilty of negligence as defined to you, in causing the original accident and injuries."

Seventh. The court erred in refusing to give defendant's requested special charge, number 12, as follows:

"You are further charged that it is a matter of common
144 knowledge that freight trains cannot be, and are not usually moved or stopped with that absence of jerk or jar characteristic of the movement of passenger trains, and that in moving freight trains, there are necessarily jerks and jars, caused from taking up and running out of what is called the slack, and if you believe from the testimony that plaintiff's, injuries were caused by his fall from the car caused by the taking up or running out of the slack, and that such was no greater in degree than is ordinarily incident to the starting and stopping of freight trains, and that plaintiff's fall was caused by this in connection with the slippery character of the top of the car, then you are instructed that these were risks assumed by the plaintiff, and he cannot recover for any injuries occasioned thereby."

Eighth. The court erred in refusing to give defendant's special charge number 13*b*, as follows:

"You are further charged that the uncontradicted evidence in this case is that the string of cars from which plaintiff fell, was being at the time of the accident, operated and stopped in the usual mode and manner of operating and stopping freight trains, if therefore you believe from the evidence that plaintiff's injury, if any, was caused by the manner of operating and stopping the train or string of cars then plaintiff cannot recover in this case."

Ninth. The court erred in refusing to give special charge number 9 requested by defendant, as follows:

"You are further charged that in taking employment, a brakeman assumes all risks necessarily incident to his employment, and if you should believe from the evidence in this case that plaintiff was injured by being exposed to the risks necessarily incident to his employment, he cannot recover."

Tenth. The court erred in refusing to give special charge number 11, as requested by defendant, as follows:

"You are further charged that where one voluntarily enters into a contract of hiring with a railway company, and assumes all the risks and hazards ordinarily and usually incident to such employ-

ment, he will be presumed to have contracted with reference to such risks and hazards."

Eleventh. The court erred in giving special charges numbers 9 and 11 requested by defendant, with the following qualifications made by the court, at the request of plaintiff:

"In connection with special charges No. 9 and 11 of defendant, the plaintiff asks the court to instruct the jury: That while the employé assumes the risks ordinarily incident to his employ-
145 ment, he does not assume the risks incident to his employment which may be occasioned or caused by the negligence of the other employés operating the train."

And in making such qualifications.

Twelfth. The court erred in refusing to give special charge number 10, as requested by defendant, as follows:

"You are further charged that plaintiff does not allege in his petition any negligence on the part of defendant company in allowing its cars to become coated with ice or sleet, and if you believe from the evidence, that plaintiff was injured in consequence of slipping or falling by reason of the snow, ice or sleet on top of the cars, then plaintiff cannot recover for any damages he may have received by reason of such fall." And in giving said special charge with the following qualifications:

"Plaintiff asks that if this charge be given, that it be given with this qualification: 'Provided his injuries were not caused by reason of the negligence, if any there was, of the employés operating the train.'"

Thirteenth. The court erred in refusing to give special charge number 3, as requested by defendant, as follows:

"You are further charged that if you believe from the evidence that the present condition of plaintiff's leg was caused by improper treatment, or want of attention on the part of surgeons, then you are charged that the defendant is not liable for the damage caused by such condition although you may believe from the evidence the defendant, its agents or servants were guilty of negligence in causing the injury, as defined in the general charge."

And in qualifying it, and giving it with the qualifications, as follows:

"Plaintiff asks that, if this special charge be given, it be qualified or explained as follows: But in such case, though you may find that the plaintiff's injuries, as they now exist, may have been caused by failure to give him proper treatment or want of attention on the part of the surgeons, yet he can recover for all the injuries occasioned by the original accident, and all the damages that he may have suffered or may hereafter suffer as the direct and proximate result of his said original accident, as may be shown by the testimony, provided the defendant company is liable at all under the charge of the court."

Fourteenth. The court erred in refusing to give special charge number 4, as requested by defendant as follows:

"You are further charged that if you believe from the evidence

that the cars from which plaintiff fell were covered with sleet
146 and ice, and that that fact was known to plaintiff, and if plaintiff knew that walking upon the cars in that condition was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon the top of the cars, and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their condition made it dangerous to him in moving the cars, he will be held to have assumed the risk of all such dangers, and if his injuries were caused by such condition of the cars, moved in the ordinary and usual way, and stopped in such way, he cannot recover for any injuries occasioned thereby."

And in giving said special charge with the interlineations and erasures made by the court, as appears in the following copy of said charge with the interlineations shown in parentheses, and the erasures shown in brackets:

"You are further charged that if you believe from the evidence, that the cars from which plaintiff fell were covered with sleet and ice and that that fact was known to plaintiff, and that if plaintiff knew that walking upon the cars in that condition was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon the top of the cars and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their condition made it dangerous to him in moving the cars, he will be held to have assumed the risk of all such dangers, and if his injuries were caused by such condition of the cars [moved in the ordinary and usual way and stopped in such way,] (and not by the negligence of those operating them, if any,) he cannot recover for any injuries occasioned thereby."

Fifteenth. The court erred in refusing to give special charge number 6, as requested by defendant, as follows:

"You are further charged that it was and is the duty of the plaintiff to take such measures, and submit himself to such medical treatment and care as would lessen the injury or damage to him, if any, and if you believe from the testimony that the present condition of the plaintiff's leg is caused by his own negligence or carelessness or by failure to follow the directions of his medical attendants and advisers and by failing to submit himself to the proper and necessary treatment of his leg, and that otherwise his leg could have been restored to a sound condition, or the damages or injury repaired to any extent, then he cannot recover damages against defendant for any condition of his leg, or for want of healing or repair of the injury caused by such conduct on his part."

And in making the interlineation, and giving the charge so
147 interlineated as shown by the following copy of said charge with the interlineations made by the court shown in parentheses:

"You are further charged that it was and is the duty of the plaintiff to take such measures, and submit himself to such medical treatment and care as would lessen the injury or damage to him, if any, and if you believe from the testimony that the present condition of the plaintiff's leg is caused by his own negligence or care-

lessness or by (his negligent) failure to follow the directions of his medical attendants and advisers, and by (negligently) failing to submit himself to the proper and necessary treatment of his leg, and that otherwise his leg could have been restored to a sound condition, or the damage or injury repaired to any extent, then he cannot recover damages against defendant for any condition of his leg (brought about by any negligence of his own if he has been negligent) or for any want of healing or repair of the injury caused by such conduct on his part."

Sixteenth. The court erred in refusing to set aside the verdict and judgment herein, and in overruling defendant's motion for a new trial, as made, upon the ground that the verdict of the jury and judgment was grossly excessive in amount, showing that the jury were influenced by passion and prejudice and did not act upon a proper consideration of the facts and the law in the case.

Seventeenth. The court erred in refusing to set aside said verdict and judgment and in overruling defendant's motion for a new trial as made, upon the ground that the verdict of the jury is against the law and the evidence; and because the verdict of the jury was against the overwhelming preponderance of the evidence, in that (1) the evidence showed that at the time of the accident, the string of cars from which plaintiff fell, was being hauled in the ordinary and usual way of handling, stopping, starting and hauling freight trains, and that the running out of the slack, as testified to by all of the witnesses, and as it then occurred, was no more than was ordinarily incident to such movements of freight trains, and that plaintiff's fall was caused by such movements, in connection with the ice on top of the cars; (2) that all of the expert testimony in the case was to the effect that defendant's leg, by proper care and treatment, could have been and can be restored to its original soundness, and that there is no permanent impairment of his leg, and that its present condition arose solely from plaintiff's own carelessness, and lack of medical attention after he left defendant's hospital.

148 Eighteenth. There was further error in this: Because it appears from the record in this case that the judgment was given for the plaintiff, Abe Behymer, whereas, by the law of the land, and under the facts in this case, it should have been given for defendant.

Wherefore, defendant prays that its assignment of errors be sustained, and that the judgment aforesaid be reversed, annulled and held for naught, and the case remanded.

DUNCAN & JONES,
Attorneys for Defendant, The Texas & Pacific Railway Company.

(Indorsed:) No. 2405. In the circuit court of the United States for the eastern district of Texas, at Tyler. Abe Behymer *vs.* Texas & Pacific Railway Co. Assignment of errors. Filed February 11th, 1901. C. Dart, clerk, by D. W. Parish, deputy.

Bond on Writ of Error.

Filed February 15th, 1901.

In the Circuit Court of the United States in and for the Eastern District of Texas, at Tyler, Texas.

ABE BEHYMER
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 2405.

Know all men by these presents, that we, The Texas & Pacific Railway Company, as principal, and Edw. O. Tenison and A. P. Tenison, as sureties, are held and firmly bound unto Abe Behymer in the full and just sum of twenty thousand ($20,000.00) dollars to be paid to the said Abe Behymer, his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 6th day of February, A. D. 1901.

Whereas, lately at a term of the circuit court of the United States in and for the eastern district of Texas, at Tyler, in a suit pending in said court between Abe Behymer, plaintiff, and The Texas & Pacific Railway Company, defendant, cause No. 2405 on the
149 docket of said court, judgment was rendered against the said The Texas & Pacific Railway Company in favor of plaintiff for the sum of ten thousand ($10,000.00) dollars, with six per cent. interest thereon from date of judgment and all costs of said suit, and the said Texas & Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Abe Behymer citing and admonishing him to be and appear before the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof. Now, the condition of the above obligation is such that if the said The Texas & Pacific Railway Company prosecute its writ of error to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS & PACIFIC
RAILWAY COMPANY,
By JOHN M. DUNCAN, *Agent.*
EDW. O. TENISON.
A. P. TENISON.

Sealed and delivered in the presence of—
—— ——.

The above bond examined and approved by me, this 13th day of February, A. D. 1901.

D. E. BRYANT,
Judge Presiding at the Trial.

The above and attached bond for twenty thousand ($20,000.00) dollars with Edw. O. Tenison and A. P. Tenison as sureties, I consider good, and the sureties sufficient; and if the bond were presented to me for approval, I would approve the same.

Witness my hand and seal this 6th day of February, A. D. 1901.

[SEAL.] J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

(Indorsed:) No. 2405. In the circuit court of the United States, eastern district of Texas, at Tyler. Abe Behymer *vs.* Texas & Pacific Railway Co. Bond on writ of error. Filed February 15, 1901. C. Dart, clerk, by D. W. Parish, deputy.

150 *Order Allowing Writ of Error.*

ABE BEHYMER
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 2405.

The writ of error applied for above is hereby allowed, the same to act as a supersedeas upon the judgment in the cause upon the approval and filing of a supersedeas bond in the sum of twenty thousand ($20,000.00) dollars.

This 13th day of February, A. D. 1901.

D. E. BRYANT,
Judge Presiding at the Trial.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Texas, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Abe Behymer, plaintiff, and The Texas & Pacific Railway Company, defendant, wherein a judgment was rendered in favor of said plaintiff, against the defendant, The Texas & Pacific Railway Company on January 11th, 1901, for the sum of ten thousand ($10,000.00) dollars, a manifest error hath happened, to the great damage of the said The Texas & Pacific Railway Company as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, together with this writ, so that you have the same at New Orleans thirty days from this date in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

151 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of February, in the year of our Lord one thousand nine hundred and one.

C. DART,
Clerk of the United States Circuit Court
for the Eastern District of Texas,
[SEAL.] By D. W. PARISH, *Deputy.*

Allowed February 15th, A. D. 1901.

D. E. BRYANT,
Judge Presiding at said Trial.

I, C. Dart, clerk of the United States circuit court for the eastern district of Texas, at Tyler, Texas, do hereby certify that a true and correct copy of the within writ of error has been made and filed with the record of the case in this office.

Given under my hand and seal of this circuit court of the United States for said eastern district of Texas, at Tyler, this 23rd day of February, A. D. 1901.

C. DART, *Clerk,*
[SEAL.] By D. W. PARISH, *Deputy.*

(10c. doc. stamp cancelled.)

(Indorsed:) No. 2405. United States circuit court, eastern district of Texas. Abe Behymer *vs.* The Texas & Pacific Railway Co. Writ of error. Filed February 14, 1901. C. Dart, clerk, by D. W. Parish, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Abe Behymer, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the fifth circuit, at New Orleans, Louisiana, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the eastern district of Texas, at Tyler, wherein The Texas & Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

152 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of February, in the year of our Lord one thousand nine hundred and one.

[SEAL.] D. E. BRYANT, *Judge.*

Tyler, Texas, Feb'y 15th, 1901.

Attest:
C. DART, *Clerk,*
By D. W. PARISH, *Deputy.*

TYLER, TEXAS, *Feb. 15th,* 1901.

We hereby waive service upon the defendant, Abe Behymer, and accept service of the above citation in error.

F. J. McCORD,
JOHN HOWARD,
JOHNSON & EDWARDS,
Att'ys for Abe Behymer, Defendant.

I, C. Dart, clerk of the circuit court of the United States *circuit court* for the eastern district of Texas, do hereby certify that a true and correct copy of the within citation in error has been made and filed with the papers in this case, and is of record in this office.

Given under my hand and seal of the circuit court, eastern district of Texas, at Tyler, this 23rd day of February, A. D. 1901.

[SEAL.] C. DART, *Clerk,*
By D. W. PARISH, *Deputy.*

(Ten-cent internal-revenue stamp cancelled.)

(Indorsed:) No. 2405. United States circuit court, eastern district of Texas. Abe Behymer *vs.* The Texas & Pacific Railway Co. Citation in error. Filed February 15th, A. D. 1901. C. Dart, clerk, by D. W. Parish, deputy.

Order that Transcript of the Record and Proceedings be Transmitted to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, La.

And thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States circuit court of appeals for the fifth circui-; and the same is transmitted accordingly.

Teste:

[SEAL.] C. DART, *Clerk,*
By D. W. PARISH, *Deputy.*

153 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Eastern District of Texas, at Tyler.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Tyler, do hereby certify the foregoing one hundred and eighty-four pages of typewritten matter contain a full, true and correct transcript of the opening order of said court at its January term, 1901; plaintiff's original petition, citation, and sheriff's return thereon, plaintiff's first amended original petition, contract of attorneys, petition for removal of cause to U. S. circuit court, bond on removal to U. S. circuit court, order of removal, defendant's original answer, plaintiff's first supplemental petition, orders in the case, judgment of the court, motion for a new trial, order overruling motion for a new trial, order giving forty days to present and file bill of exceptions, bill of exceptions, petition for writ of error, assignment of errors, bond on writ of error, approval of writ of error bond, order allowing writ of error, the original writ of error and the original citation in error, in cause No. 2405, on the law docket of said court, entitled Abe Behymer *versus* The Texas & Pacific Railway Company, all of which appear from the records and files of said court.

In testimony whereof I have hereunto affixed the seal of said court, at Tyler, Texas, and the signature of the clerk hereof, this the 23rd day of February, A. D. 1901.

[SEAL.]

C. DART, *Clerk*,
By D. W. PARISH, *Deputy*.

(Ten-cent internal-revenue stamp cancelled.)

154 United States Circuit Court of Appeals for the Fifth Circuit, November Term, 1900.

MAY 8, 1901.

(Extract from Minutes.)

TEXAS & PACIFIC RAILWAY COMPANY
vs.
ABE BEHYMER. } No. 1040.

This cause was regularly called this day, and after argument by Mr. Cone Johnson for defendant in error, was submitted to the court, upon briefs of counsel heretofore filed.

155 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

DECEMBER 3RD, 1901.

(Extract from Minutes.)

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABE BEHYMER, Defendant in Error. } No. 1040.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause, be and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company and the sureties on the writ of error bond herein, Edw. O. Tension and A. P. Tension, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

156 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

Filed December 3, 1901.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABE BEHYMER, Defendant in Error. } No. 1040.

Error to the circuit court of the United States, eastern district of Texas.

Before Pardee, McCormick, and Shelby, circuit judges.

By the COURT: The general charge requested in favor of the defendant in the court below was properly refused, because, if for no other reason there was evidence tending to show that the defendant railway company was negligent in regard to the appliances furnished; that is to say, in regard to the spike protruding from the roof of the car from which Behymer fell, which negligence tended to contribute to Behymer's injury.

No request appears to have been made to the trial judge to take from the consideration of the jury the question of negligence of the railway company in handling and operating the train, on the ground that the undisputed evidence shows that the train was handled in the usual proper and customary manner. There seems to have been considerable if not conclusive ground for such request, but we cannot go beyond the record.

On the other errors assigned, we do not find that the trial judge erred to the prejudice of the plaintiff in error.

The judgment of the circuit court is affirmed.

157 United States Circuit Court of Appeals, Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABE BEHYMER, Defendant in Error.
} No. 1040.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause, there is manifest error in this, to wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas.

II.

The circuit court of appeals, erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to charge the jury as requested by plaintiff in error, as follows:

"Upon the law and the facts in this case, the plaintiff is not entitled to recover, and you are instructed to return a verdict for the defendant."

Because (1) plaintiff assumed the risk by exposure to which he was hurt, in accepting employment as a brakeman; and (2) there was no credible evidence to warrant a verdict for the plaintiff (3) because plaintiff was guilty of contributory negligence, and upon all the evidence, was not entitled to recover.

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas,
158 and in holding that said court committed no error in its main charge to the jury in the following portions thereof:

"It is the duty of the parties in charge of the train, in moving it' to use ordinary care in its handling. By the term 'ordinary care' is meant that degree of care and caution that a person of ordinary prudence under the same circumstances, would use; an ordinarily prudent man would use under the circumstances. There has been considerable proof in this case that this particular car or train of cars was moved and stopped as freight trains were ordinarily moved and stopped. Upon that question it might show that the care required by law, was used, or it might not show the care. The question for you to determine is, under the facts of this particulare case, and under all the evidence introduced, did the parties in charge of

the train use ordinary care in handling it, in so far as their duty required to avoid injuring any one; that is, did the operators in charge of the train as to starting it or stopping it, use the degree of care that a person of ordinary prudence would use in that business, under the circumstances. If they used the degree of care that an ordinarily prudent person, that is, a person of ordinary prudence, under the circumstances, would have used, then the ground of negligence would fall, and plaintiff would not be entitled to recover upon that ground. But if from the evidence you find as a fact that ordinary care, as has been defined to you, was not used by the parties in charge of the train and that the plaintiff was injured in consequence thereof, without contributory negligence on his part, he would be entitled to recover."

"That is, if from the evidence it appears that the parties in charge of the train used ordinary care as defined, that is, the care that an ordinarily prudent person under like circumstances would have used, then even if plaintiff was hurt by the movement of the train, if the moving was done in the manner an ordinarily prudent person would have done, then he cannot recover. But if they failed to use ordinary care, as defined, that is, such care as an ordinarily prudent person under the circumstances would have used, and the plaintiff was without his fault, injured, he can recover."

"Therefore, if you find from the evidence that the plaintiff was injured by the negligence in the manner in which the train was handled, and he was injured without his fault by reason of the manner in which they were handled, he would be entitled to recover."

"If he fell because of the condition of the top of the car, and that the car was being handled with the degree of care that an ordinarily prudent person would handle a car, and that he slipped and fell on account of the condition of the ice, and that was the cause of the fall, the plaintiff would not have a cause of action, and you will find for the defendant."

Because the question was, and the rule is, was the train at the time plaintiff fell therefrom, being operated in the usual and ordinary way of handling freight trains, and in switching cars; and was the jerk, bump or jar any greater than is ordinarily incident to the handling of freight cars and trains in switching. If not, it was an assumed risk. And because said quoted passages limit the inquiry as to persons of ordinary prudence, when it should be as to whether engineers and train operatives ordinarily and usually handle
159 trains in the way that one was handled at the time of the accident.

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in the following part of the main charge:

"The defendant also pleads in their answer that the plaintiff was guilty of contributory negligence by which he was injured in de-

fense. By contributory negligence is meant the doing of an act that a man of ordinary prudence and caution would not have done under the circumstances, which contributed to his injury, or it consists in the failure to do an act that a man of ordinary care and prudence would have done under the circumstances. It means that if the plaintiff was negligent, and the defendant was negligent, no recovery can be had. It means that the defendant must have been negligent and the plaintiff not negligent."

In failing in this passage, as well as the entire charge, to instruct the jury that if defendant in error's negligence contributed in any degree to the accident and injury, he could not recover, even though plaintiff in error had been negligent.

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in its main charge in failing to instruct the jury upon an issue made by the pleadings, upon which there was evidence, to wit: That if plaintiff knew that the tops of the cars were covered with ice, and were dangerous to brakemen going on top of same, then he was not bound to go into such dangers, and it was incumbent upon him to use that high degree of care for his safety commensurate with the known dangers to be encountered, and that if he failed to do so, and was injured, he would be guilty of contributory negligence and could not recover.

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VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error as follows:

"You are further charged that if you believe from the evidence that by proper surgical treatment and attention, and by proper conduct and submission to treatment on the part of the plaintiff, his broken leg would have (been) restored to soundness then he would not be entitled to recover any damages against the defendant, even if the defendant was guilty of negligence as defined in the general charge beyond an amount sufficient to compensate him for loss of time, and mental and physical pain, during the time it would have required to restore his leg to such sound condition."

VII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that all the evidence in this case concerning the nature of plaintiff's injury to his leg, and the proper and

necessary treatment thereof, is to the effect that by proper surgical and medical treatment, his leg could be, and could have been restored to a condition of usefulness and soundness. It is further in evidence without contradiction, that plaintiff was solicited by the surgeons in charge of defendant's hospital, and by Dr. Saunders, a surgeon at Ft. Worth to enter his hospital and receive there surgical and medical treatment for the restoration of his leg, and that plaintiff declined to take such surgical and medical treatment and attention, and it is further in evidence by the plaintiff himself, and without contradiction, that he has had no medical attention or care for his leg since he left the hospital of the defendant at Marshall, and you are further instructed that the plaintiff cannot recover any damages he may have suffered by reason of the injury to his leg, or for any permanent impairment of his leg, beyond an amount that would reasonably compensate him for the mental and physical suffering immediately caused by the injury to his leg, during the time in which he might have been restored by proper medical and surgical treatment and attention, and for any other injuries, if any, he may have suffered from the original accident, then he could not recover damages for that unless you believe from the evidence under the instructions heretofore given you, that the company, its agents or servants, were guilty of negligence as defined by you, in causing the original accident and injuries."

161 VIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that it is a matter of common knowledge that freight trains cannot be, and are not usually moved or stopped with that absence of jerk or jar characteristic of the movement of passenger trains, and that in moving freight trains, there are necessarily jerks and jars caused from taking up and running out of what is called the slack, and if you believe from the testimony that plaintiff's injuries were caused by his fall from the car caused by the taking up, or running out of the slack, and that such was no greater in degree than is ordinarily incident to the starting and stopping of freight trains, and that plaintiff's fall was caused by this in connection with the slippery character of the top of the car, then you are instructed that these were risks assumed by the plaintiff, and he cannot recover for any injuries occasioned thereby."

IX.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that the uncontradicted evidence in this case is that the string of cars from which plaintiff fell, was being

at the time of the accident, operated and stopped in the usual mode and manner of operating and stopping freight trains, if therefore, you believe from the evidence that plaintiff's injury, if any, was caused by the manner of operating and stopping the train or string of cars then plaintiff cannot recover in this case."

X.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that in taking employment, a brakeman assumes all risks necessarily incident to his employment, and if you should believe from the evidence in this case that plaintiff was injured by being exposed to the risks necessarily incident to his employment, he cannot recover."

XI.

The circuit court of appeals erred in its judgment affirm-
162 ing the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error as follows:

"You are further charged that where one voluntarily enters into a contract of hiring with a railway company, and assumed all the risks and hazards ordinarily and usually incident to such employment, he will be presumed to have contracted with reference to such risks and hazards."

XII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in giving special charges requested by plaintiff in error, with the following qualifications made by the court at the request of the defendant in error:

"In connection with special charge No. 9 and No. 11, of defendant, the plaintiff asks the court to instruct the jury: That while the employé assumes the risks ordinarily incident to his employment, he does not assume the risks incident to his employment which may be occasioned or caused by the negligence of the other employés operating the train."

XIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that plaintiff does not allege in his petition any negligence on the part of defendant company in allowing its cars to become coated with ice or sleet, and if you believe

from the evidence, that plaintiff was injured in consequence of slipping or falling by reason of the snow, ice or sleet on top of the cars, then plaintiff cannot recover for any damages he may have received by reason of such fall."

And in giving said special charge with the following qualifications: "Plaintiff asks that if this charge be given, then it be given with this qualification: Provided, his injuries were not caused by reason of the negligence, if any there was, of the employés operating the train."

XIV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

163 "You are further charged that if you believe from the evidence that the present condition of plaintiff's leg was caused by improper treatment, or want of attention on the part of surgeons, then you are charged that the defendant is not liable for the damage caused by such condition, although you may believe from the evidence the defendant, its agents or servants were guilty of negligence in causing the injury, as defined in the general charge."

And in qualifying it, and giving it with the qualifications as follows:

"Plaintiff asks that, if this special charge be given, it be qualified or explained as follows: 'But in such case, though you may find that the plaintiff's injuries, as they now exist, may have been caused by failure to give him proper treatment or want of attention on the part of the surgeons, yet he can recover for all the injuries occasioned by the original accident, and all the damages that he may have suffered or may hereafter suffer as the direct and proximate result of his said original accident, as may be shown by the testimony, provided the defendant company is liable at all under the charge of the court.'"

XV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that if you believe from the evidence that the cars from which plaintiff fell were covered with sleet and ice, and that the fact was known to plaintiff, and if plaintiff knew that walking upon the cars in that condition was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon the top of the cars, and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their condition made it dangerous to him in moving the cars, he will be held to have assumed the risk of all such dangers, and if his injuries were caused by such condition of the cars, moved

in the ordinary and usual way, and stopped in such way, he cannot recover for any injuries occasioned thereby."

And in giving said special charge with the interlineations and erasures made by the court, as appears in the following copy of said charge, with the interlineations shown in parenthesis and the erasures shown in brackets:

"You are further charged that if you believe from the evidence that the cars from which plaintiff fell were covered with sleet and ice and that that fact was known to plaintiff, and that if plaintiff knew that walking upon the cars in that condition was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon the top of the cars and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their condition made it dangerous to him in moving the cars, he will be held to have assumed the risk of all such dangers, and if his injuries were caused by such condition of the cars (moved in the ordinary and usual way and stopped in such way) (and not by the negligence of those operating them, if any) he cannot recover for any injuries occasioned thereby."

164

XVI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are therefore charged that it was and is the duty of the plaintiff to take such measures, and submit himself to such medical treatment and care as would lessen the injury or damage to him, if any and if you believe from the testimony that the present condition of the plaintiff's leg is caused by his own negligence or car-lessness, or by failure to follow the direction of *the* his medical attendants and advisers, and by failing to submit himself to the proper and necessary treatment of his leg, and that otherwise his leg could have been restored to a sound condition, or the damages or injury repaired to any extent, then he cannot recover damages against defendant for any condition of his leg or for want of healing or repair of the injury caused by such conduct on his part."

And in making the interlineation and giving the charge so interlineated, as shown by the following copy of said charge, with the interlineations made by the court shown in parenthesis:

"You are further charged that it was and is the duty of the plaintiff to take such measures, and submit himself to such medical treatment and care as would lessen the injury or damage to him if any, and if you believe from the testimony that the present condition of the plaintiff's leg is caused by his own negligence or car-lessness, or by (his negligent) failure to follow the directions of his medical attendants and advisers, and by (negligently) failing to submit himself to the proper and necessary treatment of his leg, and that otherwise his leg could have been restored to a sound condition, or the damage or injury repaired to any extent, then he cannot recover damages against the defendant for any condition of his leg (brought

about by any negligence of his own if he has been negligent) or for any want of healing or repair of the injury caused by such conduct on his part."

XVII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to set aside the verdict and judgment herein, and in overruling defendant's motion for a new trial, as made, upon the ground that the verdict of the jury and judgment was grossly excessive in
165 amount, showing that the jury were influenced by passion and prejudice and did not act upon a proper consideration of the facts and the law in the case.

XVIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to set aside said verdict and judgment, and in overruling defendant's motion for a new trial as made, upon the ground that the verdict of the jury is against the law and the evidence; and because the verdict of the jury was against the overwhelming preponderance of the evidence, in that (1) the evidence showed that at the time of the accident the string of cars from which plaintiff fell, was being hauled in the ordinary and usual way of handling, stopping, starting and hauling freight trains, and that the running out of the slack, as testified by all of the witnesses, and as it then occurred, was no more than was ordinarily incident to such movements of freight trains, and that plaintiff's fall was caused by such movements in connection with the ice on top of the cars: (2) that all of the expert testimony in the case was to the effect that plaintiff's leg, by proper care and treatment, could have been and can be restored to its original soundness, and that there is no permanent impairment of his leg and that its present condition arose solely from plaintiff's own carelessness, and lack of medical attention after he left defendant's hospital.

XIX.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error, because it appears from the record in this case that the judgment was given for defendant in error Abe Behymer, whereas, by the law of the land and under the facts in this case, it should have been given for plaintiff in error.

Wherefore, The Texas and Pacific Railway Company, plaintiff in error prays that said judgment be reversed, and it will ever pray.

T. J. FREEMAN,
Attorney for The Texas & Pacific R'y Co., Pl'ff in Error.

Endorsed: Filed Dec. 31, 1901. Charles H. Lednum, clerk.

18—224

166 Know all men by these presents, that we, The Texas and Pacific Railway Company as principal, and George J. Gould of Lakewood New Jersey, as sureties, are held and firmly bound unto Abe Behymer in the full and just sum of twenty thousand ($20,000.00) dollars to be paid to the said Abe Behymer or his certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of December in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a regular term of the circuit court of the United States in and for the eastern district of Texas and on January 11, 1901 in a suit depending in said court, between Abe Behymer, plaintiff, and The Texas & Pacific Railway Company, defendant, a judgment was rendered against said railway company for the sum of ten thousand dollars ($10,000) besides costs of suit: and,

Whereas from said judgment the said railway company duly obtained a writ of error from the United States circuit court of appeals for the fifth circuit; which court on the third day of December 1901 rendered a judgment affirming the said judgment, and the said The Texas and Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Abe Behymer or his attorneys of record citing and admonishing him to be and appear at a Supreme Court of the United States at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Texas and Pacific Railway Company shall prosecute its said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS AND PACIFIC
RAILWAY COMPANY,
By GEOR. J. GOULD, *Pres't.* [SEAL.]
GEO. J. GOULD. [SEAL.]

Sealed and delivered in presence of—
D. D. DUNCAN.

Attest:
[SEAL.] C. E. SATTERLEN, *Sect.*

Approved to operate as a supercedeas by
EDWARD D. WHITE,
Justice of the Supreme Court of the United States.

[Endorsed:] No. 1040. Texas & Pacific R'y. Co. *vs.* Abe Behymer. Bond. Filed Dec. 31, 1901. Charles H. Lednum, clerk.

167 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Abe Behymer, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of December, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
EDWARD D. WHITE,
Justice of the Supreme Court of the United States.

[Endorsed:] No. 1040. The Texas & Pacific R'y Co. *v.* Abe Behymer. Writ of error. Filed Dec. 31, 1901. Charles H. Lednum, clerk.

A copy of this writ is this day lodged in my office for the use of the defendant in error.
December 31, 1901.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

168 UNITED STATES OF AMERICA, ss:

To Abe Behymer or his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington within thirty days from the date hereof, pursuant to a writ of error, filed in the

clerk's office of the United States circuit court of appeals for the fifth circuit, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 23th day of December, in the year of our Lord one thousand nine hundred and one.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

Filed Jan'y 6, 1902.

CHARLES H. LEDNUM, *Clerk.*

We, the undersigned, attorneys of record for Abe Behymer in the case of The Texas & Pacific Railway Company, plaintiff in error, *vs.* Abe Behymer, defendant in error, hereby accept service of the within citation in error.

At Tyler, Texas, this December 31, A. D., 1901.

CONE JOHNSON,
JAS. M. EDWARDS,
F. J. McCORD,
JOHN B. HOWARD,
Attorneys for Abe Behymer, Defendant in Error.

169 *Clerk's Certificate.*

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the above and foregoing is a full true and correct transcript of the record, bill of exceptions, assignments of error and all proceedings had in cause No. 1040, The Texas & Pacific Railway Company, plaintiff in error, *vs.* Abe Behymer, defendant in error, except that the original writ of error and citation in error are included therein, instead of copies thereof, as fully as the same remains of record and on file in my office at New Orleans, Louisiana.

Witness my hand officially and the seal of said court at New Orleans, Louisiana, this 10th day of January, A. D. 1902.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No. 18372. U. S. circuit court of appeal, 5th circuit. Term No. 224. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Abe Behymer. Filed January 15, 1902.

FILED
MAR 17 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 234.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

ABE BEHYMER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for Plaintiff in Error.

S. S. Shipgood, Printer and Custom Servant, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. ABE BEHYMER.	No. 224.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This suit was originally brought in the District Court of Gregg County, Texas, on April 6, 1900, for the recovery of damages for personal injuries sustained by plaintiff February 7, 1899, while in defendant's employment as a brakeman.

Plaintiff alleged (Tr., p. 7) that at the time of the injury he was a brakeman in the employment of the defendant on a freight train; that on the morning of February 7, 1899, his train went west from Long View Junction, and arrived at Big Sandy, where two cars,

then standing at the end of a string of cars on a side track, were to be transferred to his train; that the weather was very cold, the tops of the cars being covered with sleet, snow and ice, which fact was known to him and to the conductor and engineer of the train; that obeying his orders he went on top of the cars on the side track to loosen the brakes, and while doing so the engine was attached to said cars and drew them westward up the grade and beyond the switch at which time they were suddenly stopped by the conductor causing a jerk of the train on account of which he lost his balance, he being at the time upon the foot or running board on the top of a car, and while endeavoring to recover his balance, the bottom of his "pants" caught upon a nail protruding from the running board and threw him between the cars, breaking his leg and injuring him, as he states, for life. He alleged also that the injuries were caused by the negligence of the conductor and the engineer.

He further alleged that he was taken to defendant's hospital for medical and surgical treatment, and that the surgeons there in said hospital were negligent and careless and unskillful in the treatment of his injuries, and that owing to such negligence and carelessness the bones failed to knit together, in consequence of which his leg was useless, and he was thereby rendered a cripple for life.

The case was then removed into the United States Circuit Court for the Eastern District of Texas on the ground that a federal question was involved because of the federal character of defendant corporation. Defendant (Tr., p. 18) demurred to the petition generally and specially excepted to all those parts of the petition which sought to hold defendant liable for damages

by reason of unskillful and careless medical and surgical treatment of plaintiff's injury.

Defendant also entered a general denial, pleaded contributory negligence on the part of the plaintiff, and that plaintiff was familiar with the operation of freight trains; that he was engaged as brakeman at his own instance and request and upon that of his father; that when employed October 4, 1898, plaintiff agreed to and signed an application in which he specially assumed the risk of all such accidents as that by which he was injured, and assumed all risk of injury therefrom; denied that the conductor or any other employee had made any promise as to the movement of the train while plaintiff was upon the car. Defendant also alleged that the car from which the plaintiff fell was one belonging to the St. Louis and Southwestern Railway Company and not to defendant, and that its condition was not known to defendant's employees. It denied that there was a protruding spike on the foot-board or walk-way and alleged that upon an inspection immediately after the accident the same could not be found. Defendant also alleged that plaintiff while in the hospital refused to obey the advice and instruction of the surgeons, and against such advice walked about the hospital, left the hospital and traveled about the country endeavoring to use his limb, and that he was otherwise grossly negligent and careless in his conduct for which defendant is not liable.

Plaintiff then filed certain exceptions, which were subsequently overruled.

Upon the hearing of the demurrer the same was sustained as to the charges of unskillful treatment of the plaintiff in the hospital, and said allegations were stricken out.

At the trial, the Judge in his charge (Tr., p. 104) withdrew from the jury the consideration of the allegations of the petition in regard to the acts of the conductor, leaving but two questions of negligence for the jury to consider, namely: in the handling of the train, sudden stopping and jerking by which plaintiff said he was caused to fall, and the allegation that there was a protruding spike in the foot-board on top of the car.

There was a verdict in favor of the plaintiff in the sum of ten thousand dollars ($10,000) for which amount and costs judgment was entered. Upon writ of error the judgment was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, and from this judgment of affirmance plaintiff now brings this writ of error to this Honorable Court.

Assignments of Error.

I.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas.

II.

The Circuit Court of Appeals erred in its jugment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to charge the jury as requested by plaintiff in error, as follows:

"Upon the law and the facts in this case, the plaintiff is not entitled to recover, and you are instructed to return a verdict for the defendant."

Because (1) plaintiff assumed the risk by exposure to which he was hurt, in accepting employment as a brakeman; and (2) there was no credible evidence to warrant a verdict for the plaintiff, (3) because plaintiff was guilty of contributory negligence, and upon all the evidence was not entitled to recover.

III.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in its main charge to the jury in the following portions thereof:

"It is the duty of the parties in charge of the train, 'in moving it,' to use ordinary care in its handling. By the term, 'ordinary care' is meant that degree of care and caution that a person of ordinary prudence under the same circumstances, would use; an ordinarily prudent man would use under the circumstances. There has been considerable proof in this case that this particular car or train of cars was moved and stopped as freight trains were ordinarily moved and stopped. Upon that question it might show that the care required by law, was used, or it might not show the care. The question for you to determine is, under the facts of this particular case, and under all the evidence introduced, did the parties in charge of the train use ordinary care in handling it, in so far as their duty required to avoid injuring any one; that is, did the operators in charge of the train as to starting it or stopping it, use the degree of care that a person of ordinary prudence would use in that business, under the circumstances. If they used the degree of care that an ordinary prudent person, that is, a person of ordinary prudence, under the circumstances, would have used, then the ground of negligence would fall, and plaintiff would not be entitled to recover upon that ground. But if from the evidence you find as a fact that ordinary care, as has been defined to you, was not used by the parties in charge of the train and

that the plaintiff was injured in consequence thereof, without contributory negligence on his part, he would be entitled to recover."

"That is, if from the evidence it appears that the parties in charge of the train used ordinary care, as defined, that is, the care that an ordinarily prudent person under like circumstances would have used, then even if plaintiff was hurt by the movement of the train, if the moving was done in the manner an ordinarily prudent person would have done, then he cannot recover. But if they failed to use ordinary care, as defined, that is, such care as an ordinarily prudent person under the circumstances would have used, and the plaintiff was, without his fault, injured, he can recover."

"Therefore, if you find from the evidence that the plaintiff was injured by the negligence in the manner in which the train was handled, and he was injured without his fault by reason of the manner in which they were handled, he would be entitled to recover."

"If he fell because of the condition of the top of the car, and that the car was being handled with the degree of care that an ordinarily prudent person would handle a car, and that he slipped and fell on account of the condition of the ice, and that was the cause of the fall, the plaintiff would not have a cause of action, and you will find for the defendant."

Because the question was, and the rule is, was the train at the time plaintiff fell therefrom being operated in the usual and ordinary way of handling freight trains and in switching cars, and was the jerk, bump or jar any greater than is ordinarily incident to the handling of freight cars and trains in switching. If not, it was an assumed risk. And because said quoted passages limit the inquiry as to persons of ordinary prudence, when it should be as to whether engineers and train operatives ordinarily and usually handle trains in the way that one was handled at the time of the accident.

IV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in the following part of the main charge:

"The defendant also pleads in their answer that the plaintiff was guilty of contributory negligence by which he was injured in defense. By contributory negligence is meant the doing of an act that a man of ordinary prudence and caution would not have done under the circumstances, which contributed to his injury, or it consists in the failure to do an act that a man of ordinary care and prudence would have done under the circumstances. It means that if the plaintiff was negligent, and the defendant was negligent, no recovery can be had. It means that the defendant must have been negligent and the plaintiff not negligent."

In failing in this passage, as well as the entire charge, to instruct the jury that, if defendant in error's negligence contributed in any degree to the accident and injury, he could not recover, even though plaintiff in error had been negligent.

V.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas and in holding that said Court committed no error in its main charge in failing to instruct the jury upon an issue made by the pleadings, upon which there was evidence, to wit: That if plaintiff knew that the tops of the cars were covered with ice and were dangerous to brakemen going on top

of same, then he was not bound to go into such dangers; and it was incumbent upon him to use that high degree of care for his safety commensurate with the known dangers to be encountered, and that, if he failed to do so and was injured, he would be guilty of contributory negligence and could not recover.

VI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error as follows:

> "You are further charged that, if you believe, from the evidence, that by proper surgical treatment and attention and by proper conduct and submission to treatment on the part of the plaintiff, his broken leg would have (been) restored to soundness, then he would not be entitled to recover any damages against the defendant, even if the defendant was guilty of negligence, as defined in the general charge beyond an amount sufficient to compensate him for loss of time and mental and physical pain during the time it would have required to restore his leg to such sound condition."

VII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that all the evidence in this case concerning the nature of plaintiff's injury to his leg, and the proper and necessary treatment

thereof, is to the effect that by proper surgical and medical treatment, his leg could be, and could have been restored to a condition of usefulness and soundness. It is further in evidence without contradiction, that plaintiff was solicited by the surgeons in charge of defendant's hospital, and by Dr. Saunders, a surgeon at Ft. Worth to enter his hospital and receive there surgical and medical treatment for the restoration of his leg, and that plaintiff declined to take such surgical and medical treatment and attention, and it is further in evidence by the plaintiff himself, and without contradiction, that he has had no medical attention or care for his leg since he left the hospital of the defendant at Marshall, and you are further instructed that the plaintiff cannot recover any damages he may have suffered by reason of the injury to his leg, or for any permanent impairment of his leg, beyond an amount that would reasonably compensate him for the mental and physical suffering immediately caused by the injury to his leg, during the time in which he might have been restored by proper medical and surgical treatment and attention, and for any other injuries, if any, he may have suffered from the original accident, then he could not recover damages for that unless you believe from the evidence under the instructions heretofore given you, that the company, its agents or servants, were guilty of negligence as defined by you, in causing the original accident and injuries."

VIII.

The Circuit Court of Appeals erred in its judgment ment affirming the judgment of the Circuit Court for Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

" You are further charged that it is a matter of common knowledge that freight trains cannot be, and are not usually moved or stopped with that absence of jerk or jar characteristic of the movement of passenger trains, and that in moving freight trains, there are necessarily jerks and jars caused from taking up and running out of what is called the slack, and if you be-

lieve from the testimony that plaintiff's injuries were caused by his fall from the car, caused by the taking up, or running out of the slack, and that such was no greater in degree than is ordinarily incident to the starting and stopping of freight trains, and that plaintiff's fall was caused by this in connection with the slippery character of the top of the car, then you are instructed that these were risks assumed by the plaintiff, and he cannot recover for any injuries occasioned thereby."

IX.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that the uncontradicted evidence in this case is that the string of cars from which plaintiff fell, was being at the time of the accident, operated and stopped in the usual mode and manner of operating and stopping freight trains, if, therefore, you believe from the evidence that plaintiff's injury, if any, was caused by the manner of operating and stopping the train or string of cars, then plaintiff cannot recover in this case."

X.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that in taking employment a brakeman assumes all risks necessarily incident to his employment, and if you should believe from the evidence in this case that plaintiff was injured by being exposed to the risks necessarily incident to his employment, he cannot recover."

XI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"You are further charged that where one voluntarily enters into a contract of hiring with a railway company, and assumed all the risks and hazards ordinarily and usually incident to such employment, he will be presumed to have contracted with reference to such risks and hazards."

XII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in giving special charges requested by plaintiff in error, with the following qualifications made by the Court at the request of the defendant in error:

"In connection with special charge No. 9 and No. 11 of defendant, the plaintiff asks the court to instruct the jury: That while the employe assumes the risks ordinarily incident to his employment, he does not assume the risks incident to his employment which may be occasioned or caused by the negligence of the other employes operating the train."

XIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said

Court committed no error in refusing to give special charge asked by plaintiff in error, as follows :

" You are further charged that plaintiff does not allege in his petition any negligence on the part of defendant company in allowing its cars to become coated with ice or sleet, and if you believe from the evidence that plaintiff was injured in consequence of slipping or falling by reason of the snow, ice or sleet on top of the cars, then plaintiff cannot recover for any damages he may have received by reason of such fall."

And in giving said special charge with the following qualifications :

" Plaintiff asks that if this charge be given, then it be given with this qualification : Provided, his injuries were not caused by reason of the negligence, if any there was, of the employes operating the train."

XIV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows :

" You are further charged that if you believe, from the evidence, that the present condition of plaintiff's leg was caused by improper treatment or want of attention on the part of surgeons, then you are charged that the defendant is not liable for the damage caused by such condition, although you may believe from the evidence the defendant, its agents or servants were guilty of negligence in causing the injury, as defined in the general charge."

And in qualifying it, and giving it with the qualifications as follows :

" Plaintiff asks that, if this special charge be given, it be qualified or explained as follows : ' But in such case, though you may find that the plaintiff's injuries,

as they now exist, may have been caused by failure to give him proper treatment or want of attention on the part of the surgeons, yet he can recover for all the injuries occasioned by the original accident, and all the damages that he may have suffered or may hereafter suffer as the direct and proximate result of his said original accident, as may be shown by the testimony, provided the defendant company is liable at all under the charge of the court.'"

XV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said court committed no error in refusing to give special charge asked by the plaintiff in error, as follows:

"You are further charged that if you believe from the evidence that the cars from which the plaintiff fell were covered with sleet and ice, and that the fact was known to plaintiff, and if plaintiff knew that walking upon the cars in that condition was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon the top of the cars, and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their conditon made it dangerous to him in moving the cars, he will be held to have assumed the risk of all such dangers, and if his injuries were caused by such condition of the cars, moved in the ordinary and usual way, and stopped in such way, he cannot recover for any injuries occasioned thereby."

And in giving said special charge with the interlineations and erasures made by the Court, as appears in the following copy of said charge, with the interlineations shown in parenthesis and the erasures shown in brackets:

"You are further charged that if you believe from the evidence that the cars from which plaintiff fell were covered with sleet and ice and that that fact was

known to plaintiff, and that if plaintiff knew that walking upon the cars in that condition was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon the top of the cars and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their condition made it dangerous to him in moving the cars, he will be held to have assumed the risk of all such dangers, and if his injuries were caused by such condition of the cars (moved in the ordinary and usual way and stopped in such way) (and not by the negligence of those operating them, if any) he cannot recover for any injuries occasioned thereby."

XVI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, as follows :

"You are therefore charged that it was and is the duty of the plaintiff to take such measures, and submit himself to such medical treatment and care as would lessen the injury or damages to him, if any, and if you believe from the testimony that the present condition of the plaintiff's leg is caused by his own negligence or carelessness, or by failure to follow the direction of *the* his medical attendants and advisers, and by failing to submit himself to the proper and necessary treatment of his leg, and that otherwise his leg could have been restored to a sound condition, or the damages or injury repaired to any extent, then he cannot recover damages against defendant for any condition of his leg or for want of healing or repair of the injury caused by such conduct on his part."

And in making the interlineation and giving the charge so interlineated, as shown by the following copy of said charge, with the interlineations made by the Court shown in parenthesis :

"You are further charged that it was and is the duty of the plaintiff to take such measures, and submit himself to such medical treatment and care as would lessen the injury or damage to him, if any, and if you believe from the testimony that the present condition of the plaintiff's leg is caused by his own negligence or carelessness, or by (his negligent) failure to follow the directions of his medical attendants and advisers, and by (negligently) failing to submit himself to the proper and necessary treatment of his leg, and that otherwise his leg could have been restored to a sound condition, or the damage or injury repaired to any extent, then he cannot recover damages against the defendant for any condition of his leg (brought about by any negligence of his own if he has been negligent) or for any want of healing or repair of the injury caused by such conduct on his part."

XVII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to set aside the verdict and judgment herein, and in overruling defendant's motion for a new trial as made, upon the ground that the verdict of the jury and judgment was grossly excessive in amount, showing that the jury were influenced by passion and prejudice and did not act upon a proper consideration of the facts and the law in the case.

XVIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to set aside said verdict and judgment, and in overruling defendant's

motion for a new trial as made, upon the ground that the verdict of the jury is against the law and the evidence; and because the verdict of the jury was against the overwhelming preponderance of the evidence, in that (1) the evidence showed that at the time of the accident the string of cars from which plaintiff fell, was being hauled in the ordinary and usual way of handling, stopping, starting and hauling freight trains, and that the running out of the slack, as testified by all of the witnesses, and as it then occurred, was no more than was ordinarily incident to such movements of freight trains, and that plaintiff's fall was caused by such movements in connection with the ice on top of the cars; (2) that all of the expert testimony in the case was to the effect that plaintiff's leg, by proper care and treatment, could have been, and can be, restored to its original soundness, and that there is no permanent impairment of his leg and that its present condition arose solely from plaintiff's own carelessness, and lack of medical attention after he left defendant's hospital.

XIX.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error, because it appears from the record in this case that the judgment was given for defendant in error Abe Behymer, whereas, by the law of the land and under the facts in this case, it should have been given for plaintiff in error.

Brief.

We believe the following facts pertinent to the questions raised to be undisputed or established beyond any doubt:

1. At the time he was hurt plaintiff had been in the employment of the defendant, for about three months, as freight brakeman. On that morning he was working on a freight train going west from Longview Junction, and upon its arrival at Big Sandy, a junction point with the Cotton Belt Road, where some switching was to be done, he mounted a string of cars on the side track to let off the brakes in order that the engine might haul on to the main track and cut off two cars which were to go into said train. While engaged in letting off the brakes the engine coupled on to the string of cars and began moving them west on to the main track, and about the time the rear car of the string reached a point where the switch joined the main track, the engine stopped and the slack ran up towards the engine and then ran out again, at about which time plaintiff, being on top of Cotton Belt car No. 6500 in the string, fell from the car, breaking his leg.

2. There was a very steep up-grade going west on the switch or side track and on the main line at that place.

3. The switch track on which said string of cars was standing joins the main track of the Texas and Pacific Road about at the crossing of the Cotton Belt track, and the engine and string of cars was moving west and up-grade.

4. The morning was very cold, sleeting and snowing, and the tops of all the cars were covered with a thick coating of sleet, snow and ice. These conditions were obvious and well known to plaintiff and the other train employees.

I.

The Court should have given the peremptory instruction to return a verdict for the company as requested, because the facts showed that Behymer was hurt solely by exposure to an assumed risk, that is, a risk incident to his employment; because there was no evidence to warrant a verdict for Behymer and because the proof showed he was guilty of contributory negligence and voluntarily exposed himself to the conditions of the service of which he now complains.

Behmyer, as a brakeman, by his application for employment (Tr., 55) as well as by the law in such cases, assumed all the risks ordinarily incident to his work as such, and that the risk through exposure to which he was injured was of that nature, seems from the evidence to be clear. If his going upon the tops of the cars could be deemed to be extra hazardous in their then condition, he was aware of that condition, recognized it as dangerous and voluntarily assumed the risk, for he says he told the conductor it was dangerous before going upon the cars (Tr., 32).

Behymer was the *only witness* for the plaintiff below testifying as to conditions and what happened at Big Sandy at the time of the accident, and he nowhere says that the jerk or movement of the train which caused him to fall was an unusual, extraordinary or unnecessary movement or jerk; while all of the company's witnesses testified that there was nothing unusual or extraordinary in the movement or jerk of the train at the time he fell. The whole of plaintiff's testimony on this point was as follows:

"After the engine coupled on to the cars they pulled out pretty fast up above the switch, and when we got up to about clear, it stopped suddenly and the slack run forward and the cars rebounded and that threw me off my balance, and in trying to regain my balance the bottom of my pants was caught on a nail in the runningboard and it threw me between the cars. (Tr., 33.) * * * He moved the cars after I released the brakes, that was the usual and proper way of moving the cars, that is, to move them after I had released the brakes. * * * He made a quick stop. The sudden stop of the cars made the slack run up to the engine and jerked the cars on the rear end. That stop didn't have very much effect on me. It staggered me a little bit * * * When the engine stopped that had the effect of making the cars run forward, on account of the slack, or making them bump against the engine. The engine jerked again and that kinder gave them another sudden jerk. (Tr., 35.) * * * When he opened the engine it jerked the car again. The jerking of the cars threw me off my balance. The cars started the second time. He started them with a jerk—a sudden jerk, it was a pretty good jerk. I mean it was a good heavy jerk. I don't know that I lost my balance entirely by reason of the first jerk of the cars. I think it staggered me. Q. I will ask you again whether the first stopping of the cars caused you to lose your balance or not? A. Yes, sir. * * * The engineer of that train stopped those cars by a sudden stop, the cars ran forward quick and sudden, just as quick as they could." (Tr., 35.)

On cross-examination:

"Now it didn't make any difference how the stop was made; the cars would have a tendency to run to-

gether in going up the grade, and then they would stop, the grade in the rear of the train would stretch the cars out again, they would run down hill until the slack was out. (Tr., 39.) * * * When the train pulled out of the siding on to the main line it was going real fast, could not tell you how fast; am not an expert. When the engine stopped the cars went on towards the engine, that is, they were taking up the slack, and when the slack ran out the cars came back down grade East. * * * The tops of these cars were pretty slick that morning. The whole tops of the cars and the runningboards were pretty slick with ice. * * * I suppose I was 3 or 4 feet from the end of the car when I first lost my balance and began to slip on the top of the car. I saw the nail about the time I began to stagger on the top of the car. My foot slipped. I was already slipping on the ice when I saw the spike. The jerk of the cars is what started me, and I couldn't regain my balance because the jerk was too heavy. The slippery character of the car kept me from regaining my balance some. * * * It was the first stopping of the train and the running together of the cars that caused me to lose my balance. I lost my balance when they first stopped and then when the cars went down the grade that helped me on and threw me down. I first staggered back when the train stopped. I staggered towards the other end of the car and then when they went back it jerked me over the other way towards the end of the car. Think I would have had trouble in holding my balance on top of that car if it had not been for the ice. The jerk, I am confident, would have thrown me. Think it would have thrown me to the other car. Don't know whether I would have fallen down on the ground or not."

It will be noted here that Behymer does not give the nail as the cause of his falling, for he had already lost his balance and thinks he would have been thrown to the next car anyway.

"I think the jerk was such as to have thrown me off the car. Don't know that it would have thrown me to the ground, but it probably would. Just a second before I went to fall I saw that nail. My pants caught on the nail. I first knew my pants caught on the nail just as soon as it threw me down" (Tr., 39 and 40).

The company's witnesses all testify substantially that the movement or jerk of the train at the time Behymer fell was no more than that ordinarily incident to the operation of freight trains, as follows (for the sake of brevity will give only the substance of the testimony, without quoting the language entire):

Key, conductor, testified: The cars were comparatively still when Behymer lost his balance. The engine had stopped and the slack came back. After he lost his balance about the only move the cars made was the slack running out; that was after he lost his balance. I noticed that string of cars. When the engine pulled out and stopped, the slack out—that is, the train stretched out its full length. There was nothing unusual in their coming back. There was no extraordinary stop of the engine or running out of the slack. When the engine stopped, of course the cars behind the engine went on forward and bumped against the others, and then the slack ran back out. He lost his balance when the cars bumped up against each other, and he fell as the slack ran out. They were moving about seven or eight miles an hour in going out of the switch. If they had been pulled out slowly there would have been little slack. In pulling a train there is no slack in it. It depends on the speed whether the slack will run up against the engine. Could have run up there at such a rate that the cars would have stopped themselves; that was not done. The train stopped as if he had put air on the engine Putting on air is what caused those cars to bump up against one another. What caused the slack to come back was that they had run up together and closed up the slack. The engineer did that day just like he usually does, stopped the cars just like he usually

stops in good weather; just as if there had been no ice on top of the cars. Made no allowance for the fact that the tops of the cars were encased in ice, that I took notice of. Saw no difference between the way they were operated then and in good weather. When tops of cars are encased in ice, more difficult to keep your balance. At the time he fell on train, they had stopped all except the motion of the cars running back (Tr. 50–55).

C. A. Smith, engineer: Were not moving over six or eight miles an hour. Had quite a string of cars. Made the usual stop. Just stopped when I got the signal to stop. When I made the stop the slack of the cars ran up towards the engine. Had my brakes set, and the slack of the cars running back caused a little jar. When I stopped the slack ran up towards the engine. There was nothing unusual in that. When I made the stop out there to let the cars go in on the main line, the stop was nothing unusual; was no more sudden than usual. I had no control over the slack in the cars—that is, by the motion of the cars themselves—had no air that ran to the cars. Rate of speed that morning was about the usual rate of speed in making switches of that kind; about the usual speed I would use in making that kind of a switch under the same circumstances. It is not a fact that I was going faster than usual in pulling that string of cars out of the siding; was using just about the same speed. It was up grade where my engine was standing and up grade for some distance beyond, possibly a quarter of a mile. It is possible cars could have been pulled up in such manner that the

weight of the train would have stopped itself. If I had cut off steam and let the train roll far enough, the weight of it would have stopped it. Did not choose to let it roll; shut off the steam and put on the air and made my stop. Was not running as fast as I would run on level track. Condition of weather and top of cars had nothing to do with my stop at all. Can't say I took into consideration or made allowance for condition of weather. Knew there was ice on top of cars and everywhere (Tr., 60-62).

B. T. Stelson, brakeman on same train: When slack came back from engine I saw that Behymer was going to fall; that he had slipped, and I hallooed to the swing man not to cut them off. The engine was not in motion at the time he slipped, but the slack was. Some slack in all freight trains. Engine had stopped at time he fell. Fell just as soon as the cars could run up and come back. It was when the slack ran out he lost his balance (Tr., 67). There was nothing unusual in the motion of the slack running out of that train. The slack always runs back down grade. The engine was not stopped any more sudden than it ordinarily is. The switching was done just like it is done every time there. Engineer made no allowance for condition of weather. Just went ahead with switching (Tr., 68). The train was not stopped any more sudden than usual. They usually stop it there very suddenly because it is up-grade, and they put on the brakes and stop the cars, and the cars run back; that makes the cars bump back and forth. The engineer stopped the train that morning with the usual stop. He stopped so the cars behind the engine ran up against each other. They

do that nearly every time they stop, and then the slack runs back the other way. There was no difference in the stop that morning and the usual stop. They sometimes stop that way and sometimes make a good easy stop. This was a sudden stop. Engineer could have cut off steam and allowed train to slow down by its own motion without bumping. Could have done that; but we would never get over the road; always hurry as fast as we can. Employees paid by the mile and the time they are out. Would have been hard to have pulled that train out of that switch in such a way that the slack would not have run forward and back. Could have pulled out and let the weight of the train stop itself. Still slack would have run back. Could hardly have stopped the train so gradually that slack would not have run forward (Tr., 69).

H. A. Williams, company's agent at Big Sandy, testified: Saw him (Behymer) when he first began to fall. Train pulled up, and about the time it stopped plaintiff seemed to lose his footing and to be slipping on account of the ice being on top of the car; and the train stopped, but he just kept going and went down between the cars. Next I saw he was scrambling out from between the cars (Tr., 70). I noticed the stop that morning. There was only a few seconds between the stopping of the engine and running out of the slack of the train and Behmyer losing his footing. It was almost instantly. Am familiar with the switching of freight trains at that point. There was nothing unusual about the stop made that morning, nor the running out of the slack in the train. Heard Behmyer say he slipped and fell off the cars. Did not hear him say

anything about his pants catching on a nail (Tr., 71, 72). That train stopped suddenly enough for the cars to run forward and bump up against the engine and each other. The slack ran back. Considerable grade there. The engine and cars were stopped about the usual way that morning. Stop was about the ordinary stop. In the ordinary stop made by engineers it is sudden enough to make the cars bump up together (Tr., 73). I think the action of the cars in running forward and bumping up together and then coming back had something to do with causing him to lose his balance, and the top of the cars, I think, had something to do with it (Tr., 74).

J. E. Ferguso. fireman, said: Suppose we ran eight miles an hour in taking them out, possibly a little faster or slower. There was nothing unusual about the speed. There was nothing unusual in making the stop. We went on doing our work just the same as we did any other time in running the engine and stopping it (Tr., 88, 89).

Wm. Seay, brakeman, says: Suppose train pulled up at speed of about six miles an hour and the stop was made as usual. In making a stop on grade like that the cars run up against the engine, that is, the slack would run up and then the grade would carry the slack back. I suppose between two couplings the slack is about four or five inches (Tr., 93).

Thus it is seen that the six witness for the company who saw the accident testified that the movement of the cars by which Behymer says he was injured was not at all unusual in its character, and Behymer himself not stating that it was, it would seem that it ought to be

an end of his case on the facts. That there was no negligence assigned or proven upon the fact of the cars being coated with sleet and ice, and the risk was certainly one he assumed in his application for employment (Record, pp. 55, 56), and is a risk incident to such employment.

In *Central R. R. & B. Co. vs. Sims, 80 Ga., 749*, plaintiff, an employee on the gravel train, was going from one car to another, the train being in motion, when there was a jerk, and he was thrown between the cars and seriously injured.

Motion for new trial because the verdict for plaintiff was against the law and the evidence overruled. Exception.

Held, BLECKLEY, *Ch. J.* (p. 755):

"We think that such jerks upon a train of that character must be expected to occur, and that the risk of employment embraces them. * * * Employees upon such trains must incur such risk; they are apparently incident to the business. And we think that, under the evidence in this case, there was nothing unusual in the management of this train, and that the injury that resulted to the plaintiff below was simply an occurrence that took place in the ordinary course of business; and that there can be no recovery upon the evidence as we find it in the record."

Rutledge vs. Missouri Pac. Ry. Co., 19 S. W. Rep., 38. Supreme Court of Missouri (1892):

In this case a train, upon which plaintiff, a brakeman, was uncoupling cars, was suddenly moved, causing him an injury. Demurrer to the evidence overruled.

Held, THOMAS, J. (p. 40):

"On the other hand, if the sudden movement was the result alone of the ordinary operation of the train going on the switch, plaintiff must be held to have assumed the risk of being thrown off the car by it, and therefore, cannot recover. This is one of the risks of

the employment which the law holds that he assumed when he engaged to perform the work assigned him. He mounted the car while in motion and he knew it was going in on a switch and hence, he should have taken proper precautions against the ordinary movements of the train."

To same effect : *Davis vs. Balto. & O. R. R., 152 Pa. St., 314.*

Galveston, H. & S. R. R. vs. Lempe, 59 Tex., 19.

Fisher vs. So. Pac. R. R., 86 Cal.. 399.

International & G. N. Ry. vs. Turner, 23 S. W., 146.

Galveston H. & S. A. R. R. vs. Arispe. (Tex.) 17 S. W., 47.

The opinion of the Circuit Court of Appeals (Tr., p. 129) very clearly seems to have been that there was " considerable if not conclusive ground for such a request," namely, that there was not sufficient evidence to go to the jury on " the question of negligence of the railway company in handling and operating the train, on the ground that the undisputed evidence shows that the train was handled *and operated* in the usual, proper and customary manner." There was such undisputed evidence as above shown.

The Court below, there, therefore, erred its charge in submitting, as it did, the question of such negligence to the jury (Tr., p. 104).

The Court also erred in its charge to the jury (Tr., 104–107) that the defendant was, as respects the plaintiff, charged with the duty, under the circumstances, of making a distinct inspection of the *car of another company* and to see that it was it proper order as to the alleged protruding spike before undertaking to switch the string of cars in the work of making up its train at Big Sandy. We insist, therefore, that the

Court erred in not giving the peremptory instruction requested by defendant to return a verdict in its favor.

The question of protruding nail, is further discussed in connection with the evidence under another head.

II.

The Court erred in its main charge in instructing the jury that the test of negligence on the part of the operatives of the train on which Behymer was hurt was: "Did the parties in charge of the train use ordinary care in handling it?" and throughout the main charge, in instructing the jury that such test was as to whether the train was moved and stopped at the time plaintiff was hurt, with ordinary care, that is, with the care that an ordinarily prudent person under like circumstances would have used, and in refusing to give special charges asked by the company to the effect that if they believed that plaintiff's injuries were caused by his fall from a car, caused by the taking up or running out of the slack, and that such was no greater in degree than is ordinarily incident to the starting or stopping of freight trains, then such was a risk assumed by Behymer in taking employment as a brakeman.

This proposition is founded on the third, eighth, ninth, tenth and eleventh specifications of error herein.

The Court was careful to exclude from his main charge and to erase from the special charges the doctrine of assumed risk, and placed the question of negligence or not upon the fact as to whether the train was being moved and stopped as an ordinarily prudent *person* would have moved and stopped the train in the same way under the same circumstances. Even had the Court been correct in that statement of the law, it does not follow that he should not also have charged upon the question of assumed risk. In no event should the charge have confined the jury to a consideration of what ordinarily prudent *persons* would or would not have done. An ordinarily prudent person having no knowledge or experience in the operation of freight trains, might or might not have moved it in the way it was moved, and the charge should certainly have instructed the jury as to what ordinarily prudent persons having knowledge and experience in the operation of trains would have done.

In that part of the main charge complained of the Court said :

"There has been considerable proof in this case that this particular car or train, of course, was moved and stopped as freight trains are ordinarily moved and stopped. Upon that question it might show that the care required by law was used, or it might not show the care."

What might show ? Clearly, the considerable proof that the train was moved and stopped as trains are ordinarily moved and stopped might show that the care required by law was used, *or it might not show the care*, which is equivalent to stating to the jury that, although the proof might show that the train was moved and stopped as such trains were ordinarily

moved and stopped, that the company might still be guilty of negligence in so moving and stopping it. The law being that, if it was so moved and stopped, and plaintiff was hurt thereby, it was by an exposure to an assumed risk.

It is true that the Court gave the company's special charges Nos. 9 and 11 (Tr., p. 113), but they were general in terms on the question of assumed risk, and were qualified by the Court at the request of Behymer's counsel, so as to render them of no force.

See 10th, 11th and 12th Specifications of Error herein.

The special charges applying to the doctrine the facts of the case were refused (see 8th and 9th Specifications of Error above); and the Court erased from the company's special charge No. 4, before giving it, the language which applied the doctrine of assumed risk (see 15th Specification above).

It is true the Court said in one part of his main charge:

"A person entering into the employ of a railroad in the capacity of a brakeman assumes certain risks. He assumes the risks that are incident to the employment. In other words, that employment is dangerous from the nature of it. A party entering that employment and is injured is debarred from a recovery, except," etc. (Tr., 106).

But that is an abstract statement of the doctrine, and the Court purposely, as is shown throughout the main charge and in the charges refused, refrains from stating to the jury that, if plaintiff was injured by a movement and stopping of the train in the manner in which such trains are usually moved and stopped, he cannot recover. The company's special charges Nos.

10 and 12 embodied correct propositions of law, and should have been given without the qualifications shown in the 11th specification of error above.

Fisher vs. So. Pac. R. Co., 89 Cal., 399.

III.

The Court should have charged that if Behymer's negligence in any degree contributed to his injury, he could not recover.

See 3d specification of error.

IV.

One of the issues made by the pleadings and evidence in the case was as to the dangerous condition of the tops of the cars by reason of ice, and Behymer's assumption of the risk of such condition by going on top of the cars with full knowledge of their condition and its dangers; and the Court should have instructed the jury upon that issue.

This the Court failed to do in the main charge (Tr., 104–109), and it so qualified the company's requested special charge No. 4 on that subject as to render it ineffectual, by erasures and interlineations.

See said special charge No. 4 (Tr., 114).

V.

The Court erred in refusing to give the company's requested special charges Nos. 2 and 8, in substance that if they believed that by proper conduct and submission to treatment Behymer's leg could have been restored to soundness, or a measure of soundness, he could not recover any damages beyond those he might have suffered had he submitted himself to proper medical and surgical treatment and attention.

See 6th and 7th specifications of error above.

It is believed that these charges stated the doctrine correctly and that Behymer's conduct in declining proper treatment and in want of care with and for his broken limb need not have amounted to positive negligence in order to relieve the company from responsibility for damage because of its present condition, when it might have been restored by proper care and treatment. His conduct in declining medical and surgical treatment and care, and in failing to care properly for his limb may have been in the exercise of cool judgement on his part, into which the probability of his recovering large damages for the injury, in case his leg should be in very bad condition at the trial, largely entered. In other words, such conduct may have been in furtherance of a fixed purpose with knowledge of the effect it would have upon his limb, as well as upon the amount he would recover by way of damages. In such case he could in no proper sense be said to be guilty of negligence, and yet, certainly in

such case the company would not be liable for any more than the necessary and proximate consequences of the original accident. There was positive evidence to sustain the theory that Behymer declined treatment and so conducted himself as to enhance his damages. Note his declaration to Dr. Terry, who was advising him to have an operation performed:

"He just picked his foot up and kinder shook it at me and says: 'I want to show that to a jury'" (Tr., p. 84).

Behymer did not deny this, only saying he didn't remember it.

VI.

The Court should have given the company's requested special charges, Nos. 12 and 13b, as shown in the 8th and 9th specifications of error above, in substance that if the movement and stopping of the train at the time of the accident to Behymer and the cause of the accident were such as are usually incident to the moving and stopping of freight trains, then the risk was one assumed by Behymer and he could not recover for any injuries caused thereby.

These special charges were refused and the Court throughout in the main charge and in qualifying other special charges, made the right to recover wholly depend upon the question as to whether the train was moved and stopped as an ordinarily prudent person

under the same circumstances would have moved and stopped such train.

The following cases support our contention on this point:

Davis vs. R. R. Co., 152 Pa. State, 314.
Rutledge vs. R. R. Co., 19 S. W., 38.
R. R. Co. vs. Simms, 80 Ga., 749.
R. R. Co. vs. Arispe, 17 S. W., 47.

VII.

As they embodied correct propositions of law, the Court should have given as requested charges Nos. 10 and 4 as shown in specifications of error above, Nos. 13 and 15, without the qualifications made to them by the Court as given (Tr., 112, 113).

These qualifications were reiterations of the proposition that the company would nevertheless be liable if negligence in the operation of the train was shown, thus placing too prominently and emphatically before the jury in connection with each special charge, the liability of the company in case negligence of its servants had been shown in causing the original accident; and as the Court, in its general and other charges, had again and again stated this doctrine, its only effect in these connections was to make the impression upon the minds of the jury that while all these charges as to the risks assumed by the plaintiff might be good law, they could avail the company nothing, *provided* Behymer's injuries was caused by the negligence of its servants in operating the train.

VIII.

As they embodied correct propositions of law, the Court should have given special charges Nos. 3 and 6 without the qualifications made by the Court (Tr., 113, 114).

See specifications of error Nos. 14 and 16.

The qualifications made were calculated to mislead the jury into the belief that they could award damages for all injuries arising from the original accident, notwithstanding Behymer had not taken proper care of himself, and had not submitted to proper medical and surgical treatment. Again, the qualification to charge No. 6 would exempt the company from liability only in case Behymer's conduct amounted to negligence.

IX.

The verdict of the jury for the plaintiff was not sustained by the evidence; was against the preponderance of the evidence; was grossly excessive in amount and not sustained by either the law or the facts, and the Court should have set aside the verdict and the judgment upon defendant's motion for a new trial.

See 17th, 18th and 19th specifications in error, *supra*.

That this proposition is correct is shown by the facts: (1) That the evidence showed that at the time of the accident the cars from which Behymer fell were being

moved in the ordinary and usual way of handling freight trains, and that the running out and taking up of the slack as testified to by all of the witnesses was no more on that occasion than was usually incident to such movements of freight trains, and that Behymer's fall was caused by such movements in connection with the ice on top of the cars. (2) That all the expert testimony in the case, with which there was no conflict, was to the effect that Behymer's leg by proper care and treatment could have been and can be restored to its original soundness ; that there is no permanent impairment and that its present condition arose solely from his own conduct and lack of medical and surgical attention.

In this connection it is noteworthy that Behymer in both his original and amended petitions, including the one upon which he went to trial, alleges that a large part of his damages accrued from want of care and skillful treatment on the part of the company's surgeons and agents at its hospital, and he alleges that his leg could have been restored had he received proper care and treatment (Tr., 4 and 5, 11 and 12). Upon a demurrer being sustained to those allegations he takes the other tack and inferentially in his evidence charges the whole damages to the original accident.

This case has some peculiar features. In the first place, Behymer's whole case against the company rests upon his own unsupported testimony. Secondly, his testimony is flatly contradicted in many material matters by all the other witnesses, including his own mother. In the third place, not a single physician or medical expert was called as a witness for him. A plaintiff in a damage suit against a railroad company must have a weak case indeed when he cannot bring in

some doctor to testify to the seriousness and permanency of his injuries, and as to the lack of probability of his being restored to soundness by proper surgical and medical attention ; especially so where the defendant has called four or five physicians and surgeons, at least two of whom stand pre-eminent in their profession, who testified that proper surgical treatment and care would have restored Behymer's leg, and that even now a simple operation and careful treatment would restore him to soundness. Without quoting their testimony in full, it is sufficient to say that Dr. B. F. Eads, Dr. Bacon Saunders and Dr. A. B. Terry all testified that with the proper care and treatment and proper conduct on Behymer's part, his leg could have been restored to soundness immediately after it was hurt, and that at the time of the trial, with the very smallest danger to him, his leg could be operated on and fully restored (Tr., 76, 77, 79, 80, 81, 82, 83, 84, 85, 92 and 93).

Drs. Eads, Taylor and Terry all testified to facts showing that Behymer would not follow the instructions and treatment given aim at the railroad hospital, and that the present condition of his leg was caused by his own fault (Tr., 75, 83 and 90).

That Behymer did not wish his leg to be restored and was so conducting himself as to have it in proper condition to show to a jury as a basis for large damages, is shown by his own testimony (Tr., 110), in which he declares that after he left the Marshall hospital he had no further surgical treatment of his leg and had no doctor to treat it ; that he bandaged it himself ; had no bandage on it at the time of the trial, but only a woolen stocking, and had never had any other treatment for it after he left the hospital. This notwith-

standing the fact of his claim that he was not properly treated in the hospital. He gives no reason or excuse for this utter abandonment of all effort to mitigate his injuries or restore his limb. The amputation of his leg at the point of the break would not have authorized such a large verdict.

If the testimony of these physicians be true, and it is unquestioned and unquestionable, awarding this man $10,000 for his injuries, even if caused by negligence of the company, is shocking to the conscience. Without any expense to himself he could have, in October, 1899, had his leg completely restored by a simple operation and treatment in Dr. Saunder's hospital in Fort Worth, and even now by an expenditure of a maximum amount of $500 he can have it restored, and doubtless expects to do so after succeeding in recovering the enormous amount of $10,000 from the company, thus giving him a net profit on the speculation (Saunder's testimony, Tr., 79, 92).

Keeping in view the powerful motive for Behymer to swear falsely, let us now examine in connection with our next point (X.) his and other testimony in the case, in order to determine whether he was at all worthy of belief. This is more important in this case than in most others, because his right to recover depends wholly upon his own testimony.

X.

The Protruding Nail.

Behymer, at the time he fell, was walking on the footboard, going east on top of a box car. The footboard is twelve or eighteen inches wide, extending from end to end of the top of a box car, raised slightly above the roof, and is a passageway for train operatives. We do not think his supposed protruding nail in the footboard is material in the case, save upon the question of Behymer's veracity, for even he does not give the nail as the cause of his fall, but rather as retarding it. It was doubtless intended to be alleged and proven as a cause of the accident; but some times a plaintiff must have a good knowledge of the law in order to lay in his testimony a correct basis for a recovery. He says, in substance:

"The cars rebounded and threw me off my balance, and in trying to regain it the bottom of my pants caught in a nail on the runningboard" (Tr., 33).

Being shown the pants which he was wearing at the time, he said:

"That is where they were tore by a spike. When they caught and jerked me down it tore that place across the right leg at the bottom about three inches long. Suppose it stuck up about two inches. Appeared to be a nail. Discovered it about a second or two before I was jerked down; a second or two before it caught my pants (Tr., 34). The catching of my pants on that nail threw me down. Was staggering towards the end of the car (Tr., 35). At the time I discovered the spike I was staggering around. I saw it just a second before I began to fall (Tr., 36). Saw the nail about the time I began to stagger. *My foot slipped.* Was already slipping on the ice when I saw the spike. Jerk, of course,

started me. Couldn't regain my balance; jerk, too, heavy. Slippery character of the car kept me from regaining my balance some. Think jerk would have thrown me to the other car anyway" (Tr., 40).

The torn place in his pants was near the bottom of the right leg—a horizontal tear about three inches long,—and he says that he first found the torn place over two months afterwards when he went home; that he felt the tear at the time, but never saw it until then (Tr., 41). Didn't remember when, where nor who he first told about his pants catching on a nail. Didn't know that he told any one before he told his attorneys. Told his attorneys when he brought suit (Tr., 46). Didn't remember when he told his father or mother (Tr., 46).

Now, his mother testified that she met him at Longview and went with him on the train to the hospital on the day of the accident, and that she then saw the torn place on the right leg of his pants (Tr., 48), and called his attention to it; showed him where the pants were torn that morning on the way to Marshall (Tr., 48). Said that Abe told her that morning how the torn place came to be there (Tr., 49).

Conductor Key says: That after the accident at Big Sandy he heard Behymer say nothing about his pants catching on a nail, but he merely said he lost his balance and fell (Tr., 52). Immediately after the accident he (Key) sent a car inspector on top of the car to examine it (Tr., 55).

Hamlett, the inspector, says that he examined the car fifteen or twenty minutes after the accident, going all over it, and did not observe anything out of the way, and that there was no spike or nail protruding from the running-board; had also inspected it that

morning before the accident; had a conversation with Behymer concerning it at Big Sandy after the accident, and told him he had a message from Campbell (superintendent) to examine the car and report, and he asked Behymer how he should answer it; and he replied that there wasn't anything wrong with the car and to report it O. K.; that he (Behymer) said nothing about any protruding spike or nail, and that he (Hamlett) observed no torn place on Behymer's pants (Tr., 63 and 64). That Behymer read Campbell's telegram and told him to report the car O. K. (Tr., 64).

Stelson, brakeman, got on top of the car after the accident and rode it down the main line and did not notice any spike or nail (Tr., 68). He heard nothing there that morning about a spike sticking up out of the running-board; thinks he would have seen it if there had been one. Didn't hear anything about Behymer's pants being torn and didn't notice anything of the kind (Tr., 69).

Williams, agent, heard Behymer say immediately after the accident that he slipped and fell off the cars; heard him say nothing about his pants catching on a nail (Tr., 72).

And all these witnesses, who were with Behymer at Big Sandy after he was hurt, including Dr. Dial, the physician, heard him say nothing about his pants catching on a nail and saw no torn place in his pants. Only one witness, J. E. Ferguson (Tr., 88), testified to anything of the sort, and this he afterwards modified (Tr., 98, 101, 102), and he was so thoroughly impeached that counsel for Behymer agreed that Ferguson had told Chew, an agent of the company, about September, 1909, that he heard Behymer say nothing of the kind, and that he observed no tear in his pants at Big Sandy.

And it was further agreed that Dr. Dial, who treated Behymer at Big Sandy, heard him say nothing about catching his pants on a nail or on anything else on top of the car (Tr., 101, 102).

Behymer made and signed a report of the accident immediately after he was hurt—to-wit: on the 7th day of February, 1899, in which he stated emphatically that there was no carelessness on the part of any one in the company's employ tending to cause the accident (Tr., 59); and again on February 25th, while in the hospital at Marshall, he made and signed a statement to like effect (Tr., 58). Dr. Taylor, to whom the last report was given, says that he asked him the questions shown in the form, showed it to him and told him to read it over carefully and that he had it for probably six hours, and then signed it. There was never any claim in the case that he was not in a condition to know what he was doing when he signed these reports, or that he did not know what was in them; and it does seem that if his evidence had been true on the question of the care used in handling the train, he would have known, at least by February 25th, that the less handling of the train caused the accident. That he was in a condition to talk intelligently even at Big Sandy and before he got to the hospital, is shown by the fact that he conversed freely with all the witnesses, and his mother said that when she met him at Longview shortly afterwards that morning on the way to the hospital, he was all right so far as his mind was concerned—was perfectly clear; did not seem like he was hurt (Tr., 49).

Further Points of Conflict.

Behymer testifies to a conversation with Conductor Key just before he went upon the cars, in which he told the conductor that the tops of the cars were dangerous and he didn't wish to go on them (Tr., 32 and 41). Key testified that this was absolutely untrue; that he gave him no such instructions and Behymer made no such statement to him (Tr., 51). Behymer swears emphatically that the car next west of the one he fell off was a box car (Tr., 38). Hamlett, the car inspector (Tr., 65) and Williams, the agent who saw him fall, both testify that he fell off of Southwestern Car No. 6500, and that the next car west of it was an oil tank car (Tr., 72); and Williams produced the record of the cars in that string that morning, which showed that the next car west was a tank car. Williams, as the string of cars passed him, saw Behymer climbing from the tank car on the box car No. 6500 (Tr., 70). Other witnesses corroborated these.

In regard to the interview with Dr. Bacon Saunders at Fort Worth, to whom the company's superintendent, Mr. Campbell, had taken Behymer for treatment, Behymer swears that Dr. Saunders did not say anything about curing him; didn't say he could perform an operation and restore his leg; didn't advise anything; that Campbell didn't tell him he wanted him to go to Saunders' Hospital, and that Saunders didn't teli him he could perform an operation and set his leg and likely restore it (Tr., 44). This was squarely contradicted by Dr. Saunders, who gave a full statement

of the interview and examination of Behymer's leg, and says he told him that by performing an operation he thought it could be restored; that the chances were good, amounting almost to a certainty, and told him that if he would come to his hospital that in his judgment he could make it a useful, good, sound limb; that Behymer took his proposition under advisement and left, and that was the last he saw of him (Tr., 79). Says that Campbell authorized him to go ahead and treat the limb (Tr., 81); that Campbell was present (Tr., 82). In this he was corroborated by Campbell (Tr., 97). Note here that Dr. Dial, who examined the leg at the time of the accident then reported:

"The leg can be, in my judgment, saved and made a good leg" (Tr., 70); and that Behymer "says he slipped and fell to the ground" (Tr., 59).

Behymer said he told Dr. Taylor at Marshall that he thought his leg looked crooked, but that he sneered at it, etc. (Tr., 97). Taylor says this is not true (Tr., 90),

Behymer attempted to weaken the testimony of both Drs. Terry and Taylor by charging them with drunkenness. He would probably have enlarged on that if his allegation as to malpractice in the hospital had not been eliminated.

On the question of the care he used and his submission to advice and treatment while in the hospital, he is squarely contradicted by both Drs. Eads and Taylor, who say that his leg got into its present condition after he left the hospital (see Behymer's testimony, Tr., 36, and that of Taylor and Eads, Tr., 75 and 90).

Behymer's testimony was thus rehdered so incredible that good faith required him to call to its support, if true, any other testimony which might sustain him.

Yet, neither his father nor his sister, the latter of whom appears to have been present when his mother saw him on the train, nor any doctor, were called as witnesses in his behalf, and his mother was only called in the endeavor to sustain him in the nail theory.

While the courts will not ordinarily disturb a verdict for a reasonable amount upon questions of fact passed upon by the jury, it seems to us that this is a case in which the verdict should be set aside on the facts. If verdicts rendered against the overwhelming preponderace of evidence equally credible with that of plaintiff below, and where no such motive to swear falsely can be attributed to the witnesses for the defendant as that justly attributable to Behymer in this case, are to be allowed to stand on appeal, then railroad companies might as well go to the jury upon plaintiff's own testimony alone, with the slender hope that some error of the Judge will afford ground for a new trial or reversal, which is simply deferring the evil day; for it is a fact to which the courts can no longer be blind, that in a railroad or other corporation case the verdict of the jury is certain to be for the plaintiff if there be any evidence, even a "scintilla," on his side upon which to found it, even should the defendant bring hosts of witnesses to impeach or contradict it.

The excessiveness of the amount found by the jury in this case; the fact that the verdict rests solely upon the plaintiff's own testimony; the fact that he is contradicted at almost every material point; the fact that he impeaches himself by solemn written statements which he does not attempt to explain away or modify; all call, it seems to us, for a close scrutiny of this record and for a reversal and remanding of the cause.

Wherefore, for the errors assigned, plaintiff in error prays that the judgment below be in all things reversed and held for naught, and that this cause be remanded for such further procedure herein as this Court may adjudge proper.

Respectfully submitted,

JOHN F. DILLON,

WINSLOW S. PIERCE,

DAVID D. DUNCAN,

Counsel for Plaintiff in Error.

FILED
MAR 14 1903

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 324.

TEXAS AND PACIFIC RAILWAY CO.,
Plaintiff in Error,

vs.

ABE REHYMER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

ABE REHYMER.

CONE JOHNSON,
Attorney for Defendant in Error.

No. 224.

TEXAS AND PACIFIC RAILWAY CO.,

Plaintiff in Error,

vs.

Abe Behymer.

BRIEF FOR DEFENDANT IN ERROR.

Defendant in Error, Abe Behymer, was injured while serving Plaintiff in Error, Texas and Pacific Railway Company, as brakeman on one of its freight trains, by being thrown from the top of a car. He sought to recover on two grounds of negligence, towit: the negligence of the engineer handling the cars in stopping the same suddenly and with great violence, thus causing Behymer, who was on top of the cars performing his duties, to lose his balance and fall from the car; also, that a spike had been negligently left protruding from the foot board on top the car, on which the pants of Behymer caught while he was trying to regain his balance, lost by the sudden stopping of the car, and which caused him to fall and be injured.

He sought to recover, also, on the ground of the

alleged negligent mistreatment of his injuries by the Company's Surgeon at its hospital. But, a demurrer to this ground of recovery having been sustained, the same was abandoned.

In addition to the statement made by Plaintiff in Error, the Court's attention is called to the following facts established by the evidence:

1. The tops of the cars were incased in ice, and this the engineer handling the engine and cars knew (Tr. p. 62).

2. The engineer knew that one of the brakemen was on top of the cars, moving from one to the other (Tr. p. 62).

3. The engineer knew that it was difficult for one to remain or work on top of the cars in their icy condition (Tr. p. 62).

4. The engineer stopped the cars suddenly, by the use of the air brake, which caused the cars to run forward and against each other violently and then to rebound; whereas, if he had only shut off the steam, the train, which was moving up-grade, would soon have stopped of its own weight, and the bumping and jerking of the cars would have been avoided (Tr. p 61—).

5. In stopping the cars the engineer made no allowance for, and did not take into consideration, the fact that the cars were covered with ice (Tr. p. 61-62).

6. It was shown that this sudden stopping and

jerking of the cars was not necessarily incident to their operation; on the contrary, there was an easy and safe manner in which they could have been handled without jerking and bumping them to gether. The engineer testified that if he had cut off the steam and let the train roll it would have stopped of its own weight, it being up-grade; but he "did not choose to let it roll", but applied the air and stopped suddenly (Tr. p. 62-63).

7. There was no evidence that the stop made on this occasion was the usual one made under like conditions; but the testimony for the Company on that point was that there was nothing unusual in the stop, and that the Engineer acted as he ordinarily did when the weather was good and there was no ice. There was testimony by one of the operatives of the train that "they sometimes stop that way and sometimes make a good, easy, stop" (Tr. p. 69).

Williams, one of the Company's employes, testified that the only difference between making an easy and a sudden stop was that the former required a little more time (Tr. p. 73).

One of the train operatives gave as the reason for making such sudden stop that the train crew were paid by the mile, and were in a hurry to get over the road (Tr. p. 69).

8. There was testimony establishing that a spike had been left protruding in the foot board

which extended along the top of the car for the brakemen to walk on, and on this the pants of Behymer caught while he was slipping and staggering from the jerking and bumping of the cars, which threw him (Tr. p. 33-34). This issue was submitted to the jury under instructions by the Court which are not assailed or complained of by the Plaintiff in Error.

The points involved in this case will be grouped, for the purposes of this brief, under the following heads:

I

The peremptory instruction requested by the Railway Company.

II

The negligence of the engineer, and the risk assumed by Behymer.

III

The question of contributory negligence.

IV

The duty of the injured party to use care to heal his injuries.

V

The questions of the sufficiency and weight of the testimony and the amount of the verdict cannot be reviewed, and will be considered in this brief incidentally, only.

I

The general instruction to find for the railway company, requested by Plaintiff in Error, was properly refused for the reason, if for no other, that there was evidence to show that the Defendant Company was negligent in regard to the spike protruding from the roof of the car from which Behymer fell, and which caused or contributed to cause his injury. This issue was properly before the jury and could not be withdrawn by the general charge requested by the Defendant Company.

Behymer testified that when the cars were pulled out of the side track on to the main track the Engineer stopped the train suddenly and he was thereby thrown off his balance, and while he was trying to regain his balance the bottom of his pants caught on a protruding spike or nail in the foot board, which threw him down; that the spike was near the end of the car and protruded about two inches; that he had not been on top of the car before that time, and was not aware of the spike, and saw it only a second or so before it caught his pants (Tr. p. 34). The pants, with the leg torn, were exhibited in evidence, and Behymer's mother testified that she observed the torn place on the morning of the injury while Behymer was enroute to the hospital, and that the pants were not torn when he left home that morning (Tr. pp. 47, 48, 49).

The general instruction requested by the Defendant Company was properly refused, because it sought to withdraw from the jury the issue of the Defendant's negligence with reference to the protruding spike, as well as all other issues.

II

Counter-Proposition relating to the specifications of error on the point of assumed risk:

The employe assumes the risk from dangers ordinarily incident to the service engaged in by him; but he does not assume the risk arising from the negligence of the master, or of other employes for whose negligence toward him the master is liable. At Common Law he was held to assume the risk arising from the negligence of his fellow servant; but the Statue of Texas makes the railway company liable to its employe for injuries caused by the negligence of any other servant operating its engines or cars, and brakemen do not assume the risk arising from the negligence of the engineer. The question is, was the act of the engineer negligence under the circumstances. If so, the same was the negligence of the master, the risk from which Behymer did not assume.

Neither does the employe assume the risk arising from extraordinary danger. An unusual condition existing which increased Beyhmer's peril, it was the engineer's duty to use care propor-

tionate to the danger; and Behymer had the right to expect that such care would be used, and that his perilous position would be regarded.

The question was properly submitted to the Jury under instructions which fully protected the company and permitted a recovery only in the event Behymer was injured from the manner in which the cars were handled and that such manner of handling the cars was negligent.

We quote so much of the testimony as serves to illustrate the point involved:

THE PLAINTIFF testified:

"The engineer pulled the cars west after he coupled on to them; they were pulled out (to) the main line; he moved the cars after I released the brakes; that was the usual and proper way of moving the cars, that is, to move them after I had released the brakes; he carried those cars out of the siding about 12 or 14 car lengths I guess; carried them on to the main line; don't think all the cars were out of the switch at the time he stopped the cars; he made a quick stop; the sudden stop of the cars made the slack run up to the engine and jerked the cars on the rear end. That stop did not have very much effect on me; it staggered me a little bit. I was on the car next to the last one at the time the cars were stopped; standing up on the cars, on the foot board; guess I was 8 or 10 feet from the east end of the car. When the engine

stopped that had the effect of making the cars run forward on account of the slack, or making them bump against the engine. The engine jerked again and that kinder gave me another jerk. I mean by that I suppose the engine was pulling them out of the siding. They were not out of the siding and he opened the engine to pull out in the clear, and when he opened the engine it jerked the cars again. The jerking of the cars threw me off my balance. The cars started the second time; he started them with a jerk, a sudden jerk; it was a pretty good jerk. I mean it was a good heavy jerk. I don't know that I lost my balance entirely by reason of the first jerk of the cars; I think it staggered me.

Q. I will ask you again whether the first stopping of the cars caused you to lose your balance or not?—A. Yes sir.

The second jerk of the cars was made almost instantly. I had not recovered my balance at the time the second jerk was made. The effect which a sudden stop of a train of cars has upon the cars in the train is to run the cars toward the engine; the slack in between them causes that * * * When the train is stopped suddenly the cars run forward. The other effect from a sudden stop except the running forward of the cars is that they bound back; at that place because it was down hill; suppose you would call that a rebound. The en-

gineer of that train stopped those cars by a sudden stop. The cars run forward quick and sudden; just as quick as they could" (Tr. pp. 40, 41).

On cross-examination he said:

"I suppose the ice was about a quarter of an inch thick on top of the cars that morning. It had been snowing and sleeting that morning after we came out of Longview; it was raining and freezing, and about a quarter of an inch of ice was on top of the cars" (Tr. p. 44). "The car I fell off of was one of the two rear cars, they were the two rear cars of the train. After I had gone about five cars they coupled on to the engine and moved west with the whole string. I was getting back to where I could let off the brakes on these cars and be there to ride them down when they cut them off. * * * The rear car had not reached the crossing; that is why, I think, the engineer gave a jerk, when he saw he wasn't in the clear he opened the engine up. It was not my business to signal when he was in the clear. The man at the switch does that (Tr. p. 45). The jerk of the car is what started me and couldn't regain my balance because the jerk was too heavy. The slippery character of the car kept me from regaining my balance some. I don't think I got off the running board at all. I know I didn't. It was the first stopping of the train and the running together of the cars that caused me to lose my balance. I lost

my balance when they first stopped, and when the cars went down the grade that helped me on and threw me down. I first staggered back when the train stopped. I staggered toward the other end of the car, and then when they went back it, jerked me over the other way toward the end of the car. I think I would have had trouble in holding my balance on top of that car if it had not been for the ice; the jerk I am confident would have thrown me. I think it would have thrown me to the other car, I don't know whether I would have fallen down on the ground or not" (Tr. p. 46).

J. A. KEY, conductor of the train, testified:

"The engine had run up west and had the signal to stop, and had stopped, and the slack came back; after he had lost his balance about the only move the cars made was the slack running out. That was after he lost his balance. I saw him fall on top of the car, and knew the top of the car was so slippery he couldn't stay on it; there was no way for him to stay up there because it was so slippery he couldn't hold on" (Tr. p. 51).

"I saw the train when it stopped. When the engine stopped of course the cars behind the engine went on forward and bumped up against the others and then the slack run back out. He lost his balance when the cars bumped up against each other, and he fell as the slack run out. They were moving about 7 or 8 miles an hour in going

out of the switch. If these cars had been pulled out of the switch slowly there would have been little slack in the train. When you are pulling a train there is no slack in it; it is all stretched out. It depends altogether on the speed the train is going as to whether the slack will run up against the engine or not.

Q. So, then, it could be run at a speed which the cars would not have bumped?—A. The engineer could have run up there at such a rate that the cars would have stopped themselves. That was not done that day, he applied the air on the engine very little; the train stoppod as if he had put the air on his engine; putting the air on the engine is what caused those cars to bump up against one an other; what caused the slack to come back was that they had run up together and closed up the slack. He could have pulled that train up there slow enough for the cars to have stopped themselves. He did that day just like he usually does. He stopped the cars just like he usually stops them in good weather; stopped them just as if there had been no ice on top of the car; the engineer made no allowance for the fact that the tops of the cars were incased in ice, that I took any notice of. I suppose the engineer knew the condition of the weather; there was nothing to prevent him from knowing the condition of the weather that I know of. He could tell it was raining and freezing. There was

no difference that morning so far as I could see in the way he operated the train then and the way he operated it when the weather was goood. The fact that the top of a car is incased with ice makes it more difficult to keep your balacce" [Tr. p. 53, 54].

C. A. Smith, the engineer, testified:

"I made the usual stop; just stopped when I got the signal to stop. I had air on the engine and applied it to the engine to stop." (Tr. p. 61).

"It is possible that those cars could have been pulled up in such a manner that the weight of the train would have stopped itself. If I had cut the steam off my engine and let the train roll far enough the weight of it would have stopped it. I did not choose to let it roll. I shut off the steam and put on the air and made my stop. When you want to stop an engine you cut the steam off and apply the air brakes to the engine. That causes the cars to come against each other, and then the weight of the cars pulls them back and pulls the slack out of the train. If I let it go to a stop itself the cars would come on up and the momentum of the cars would go back just the same and pull me back. What makes the slack is that the engine is stopped before the cars are and they bump up against each other and then the slack pulls out. I was not running as fast that morning as I would run on level track. The condition of the weather and the tops of the cars had nothing to do with my

stop at all. There was nothing to take into consideration. In making that stop I can't say that I took into consideration or made any allowance for the condition of the weather or the tops of the cars. I knew there was ice on the tops of the cars; there was ice everywhere. I understood at that time that it was more difficult for a man to operate on top of a car covered with ice than it was on one not covered with ice. (Tr. pp. 61, 62).

"I knew there was a man on top of the cars. * * * It was necessary for Behymer to ride those cars out of the switch in order to ride them back down the main line; he was at his proper place of duty." (Tr. p. 62).

B. T. STELSON, a brakeman, testified:

"There was nothing unusual in the motion of the slack running out of that train. The slack always runs back down grade; the engine was not stopped any more sudden than it ordinarily is." (Tr. p. 67).

On cross-examination, he said:

"The engineer did not make any allowance for the condition of the weather and sleet being on the cars, but just went ahead with the switching; made no allowance for that at all." (Tr. p. 68).

"He stopped so the cars behind the engine ran up against each other; they do that nearly every time they stop and then the slack runs back the other way. There was no difference in the stop

that morning and the usual stop. They sometimes stop that way and sometimes make a good, easy stop. This was a sudden stop. Q. Was it not possible to pull those cars out of the switch and the engineer cut off his steam and allow the train to have slowed down by its own motion, and therefore not have the bumping of it? A. Yes sir; we could have done that but we would never get over the road. We always hurry as fast as we can. The employees are paid by the mile and the time they are out. It would have been very hard to have pulled that train out of that switch in such a way that the slack would not have run forward and then back. He could have pulled it out there and let the weight of the train stop itself, still the slack would have run back. He could hardly have stopped the train so gradually that the slack would not have run forward. It was more dangerous to walk on the cars incased with ice than one that is not." (Tr. p. 69).

H. A. WILLIAMS, agent at Big Sandy, testified:

"I saw him when he first began to fall; the train was pulling up and about the time it stopped he seemed to lose his footing, and seemed to be slipping on account of the ice being on top of the car, and the train stopped but he just kept going and went down between the cars, and the next I saw he was scrambling out from between the cars." (Tr. p 70).

On cross-examination he said:

"The train stopped suddenly enough for the cars to run forward and bump up against the engine and each other. The slack run back; there is a considerable grade at Big Sandy. I have been agent there six and a half years, and have observed the switching there about the depot and depot grounds. It is possible for those cars to have been pulled out of that siding on to the main line and the engine and cars stopped gradually so that the rear cars would not bump up against each other. The only difference in that and stopping them suddenly is the saving in the time; it would consume a little more time to stop them gradually. The engine and cars were stopped about the usual way that morning. That stop was about the ordinary stop" (Tr. p. 73).

The Court instructed the jury on the question of the risk assumed:

"A person entering into the employ of a railroad in the capacity of a brakeman assumes certain risks. He assumes the risks that are incident to the emoloyment. In other words, that employment is dangerous from the nature of it. A person is liable to get hurt. A party entering that employment, and is injured while in the employment, is debarred from a recovery in the event he is injured except where he can show by the evidence that it was due to no act of his, but was the

result of negligence of other parties" (Tr. p. 106).

At the request of Plaintiff in Error the Court gave the following special instructions:

"You are further charged that in taking employment a brakeman assumes all risks neccssarily incident to his employment, and if you should believe from the evidence in this case that plaintiff was injured by being exposed to the risk necessarily incident to his employment, he can not recover" (Tr. p. 112).

"You are further charged that where one voluntarily enters into a contract of hiring with the railroad company and assumes all the risks and hazzards ordinarily and usually incident to such employment he will be presumed to have contracted with reference to such risk and hazzard." (Tr. p. 112). The Court instructed the Jury in the same connection as follows: "While the employe assumes the risk ordinarily incident to his employment he does not assume the risks which may be occasioned or caused by the negligence of the other employees operating the train." (Tr. p. 113). And at the request of plaintiff in error, the following:

"You are further charged that if you believe from the evidence that the cars from which the plaintiff fell were covered with sleet and ice, and that fact was known to plaintiff, and if plaintiff knew that walking upon the cars in that condition

was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon the top of the cars and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their condition rendered it dangerous to him in moving the cars, he will be held to have assumed the risk of all such dangers, and if his injuries were caused by such condition of the cars (and not by the negligence of those operating them, if any,) he can not recover for any injuries occasioned thereby." (Tr. p. 114).

The Jury were also instructed:

"Upon that phase of the case you are instructed that you are to determine from all the evidence what caused the plaintiff to fall. If he fell because of the condition of the top of the cars, and the car was being handled with the degree of care that an ordinarily prudent person would handle cars, and that he slipped and fell on account of the condition of the ice, and that was the cause of the fall, plaintiff would not have a cause of action, and you will find for the defendant" (Tr. p. 107).

Also as follows:

The question for you to determine is, under the facts of this particular case and under all the evidence introduced, did the parties in charge of the train use ordinary care in handling it, in so far as their duty required, to avoid injuring any one;

that is, did the operatives in charge of the train, as to starting it or stopping it, use the degree of care that a person of ordinary prudence would use in that business under the circumstances? If they used the degree of care that an ordinarily prudent person under the circumstances would have used, then the ground of negligence would fall, and plaintiff would not be entitled to recover upon that ground" (Tr. p. 105).

"Therefore, gentlemen, it is one of the disputed questions of fact in this case that you are to determine from all the evidence offered, both by the plaintiff and the defendant, applying the rule that I gave you in charge as the law of the case. That is, if from the evidence it appears that the parties in charge of the train used ordinary care, as defined, that is, the care that an ordinarily prudent person under like circumstances would have used, then, *even if plaintiff was hurt by the movement of the train*, (if the moving was done in the manner an ordinarily prudent person would have done) then he can not recover; but if they failed to use ordinary care, as defined, that is, such care as an ordinarily prudent person under the circumstances would have used, and the plaintiff was, without his fault, injured, he can reeover." (Tr. p. 105).

The testimony shows that the tops of the cars were covered with a thick coat of ice; that the Engineer was aware of this condition, as he was also

aware that Behymer was on top of the cars operating the brakes and passing from one car to another, and that on account of the conditions Behymer's danger was great and extraordinary. He made no allowance for the condition of the cars but, knowing Behymer's great danger, the Engineer, without necessity, stopped the train suddenly and with great violence. It is not insisted by Plaintiff in Error that there was any necessity or urgency for the cars to be so handled. They could have been handled without difficulty or effort in a manner which would have prevented the bumping or jerking of the cars. The reason assigned for handling them as they were was, as expressed by one of the operatives, the men were paid by the mile and hurried to get over the road, or, as expressed by another, the difference between making an easy stop and the one that was made was that the former required a little more time; while the reason given by the Engineer was that he "did not choose to let them roll".

Under the Texas Statute the Engineer stood in the place of the master. Was it not the duty of the master, knowing the peril of its servant, to use reasonable care to avoid injuring him? As is said in Railway Company vs. Watts, 63 Tex. 552, "where the employee is engaged in a dangerous service it is the duty of the master to use all reasonable and necessary means to protect him against

any superadded danger that might be reasonably expected to arise from extrinsic causes. In such cases the greater the peril to the servant on account of the nature of the service, so also, the greater the degree of care and prudence exacted of the master in protecting him against an increase of the danger arising from extrinsic causes".

The duty of the master to the servant is a varying one, to be measured by the circumstances of the case, the danger to the employe and the consequences to follow from a failure to exercise care.

The reply of the Plaintiff in Error to all this is, that it is immaterial whether the Engineer's conduct was negligent; that it has answered Plaintiff's case by showing that the cars were handled as they were ordinarily handled under other conditions, when the weather was good and the cars were not covered with ice. As was said in Wabash Rwy. Co., vs. McDaniel, 107 U. S. 454, in speaking of the risk assumed by the employee and of the master's duty to him, "to say as matter of law that a railroad corporation discharged its obligation to an employee (in respect of the fitness of co-employees whose negligence has caused him to be injured) by exercising not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far toward relieving them of all responsibility," etc. "If the general practice of such corporations in the

appointment of servants is evidence which a Jury may consider in determining whether in the particular case the requisite degree of care was observed, such practice can not be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due or reasonable or proper care, and therefore not ordinary care within the meaning of the law."

The testimony relied upon by plaintiff in error to establish that the stop made was the ordinary incident to the operation of the train was very meagre, and fell far short of establishing that the method of handling the cars on this occasion was the one usually employed on its road. As the evidence on this point is brief, we will quote it: Stelson, a brakeman, said: "The engine was not stopped any more sudden than it ordinarily is."

Key, the conductor, said: "There was no difference that morning, so far as I could see, in the way he operated the train then and the way he operated it when the weather was good".

Williams, the station agent, said: "The engine and cars were stopped about the usual way that morning. That stop was about the ordinary stop."

Smith, the engineer, said: "I made the usual stop; just stopped when I got the signal to stop. I had air on the engine and applied it to the engine to stop".

Stelson, the brakemen, also said: "They sometimes stop that way and sometimes make a good easy stop; this was a sudden stop".

This constitutes the testimony on the point of comparison of the stopping and handling of the cars on the occasion in question with the usual method of so doing. Whether by the "usual stop" the witnesses meant the stops usually made at that place or on the line of the road, or whether it was the usual stop made by that engineer or other engineers, is not explained.

Nor was it shown that Behymer was aware of such custom or method obtaining; he was inexperienced in railroading; had made only four trips on the road, and this was his second trip over that portion of it (Tr. p. 39). He was directed by the conductor to go into this place of danger, and it was necessary for some of the brakemen to perform this service (Tr. p. 37, 39). The Engineer closed his eyes to the situation, and, disregardful of the young man's danger, handled the cars in a manner which under more favorable conditions might properly be said to be negligent, and which, under the circumstances then existing, was not short of recklessness. The railway company says that a sufficient reply to this is that we usually did it that way. This would be a cruel application of the doctrine of assumed risk.

Authorities:

Hough vs. T. & P. Ry. Co., 100 U. S. 213;
Ry. Co. vs. McDaniel, 107 U. S. 454;
T. & P. Ry. Co. vs. Archibald, 170 U. S. 671;
Pantzer vs. Mining Co., 99 New York, 368;
Hosic vs. Ry. Co., 75 Iowa, 683;
Ry. Co. vs. Rowan, 104 Ind., 94;
Ry. Co. vs. Voss, 18 S. W. Rep. 172 (Mo).
Ry. Co. vs. Watts, 63 Tex. 552;
Moran vs. Harris, 63 Iowa, 390;
Pauck vs. Provision Co., 61 S. W. Rep. 806;
Lalor vs. Ry. Co. 52 Ill., 401;
Chicago Drop Forge Co. vs. Vandam, 149 Ill. 337;
Jones vs. Ry. Co., 49 Mich. 573;
Electric Co. vs. Lubbers, 11 Colo , 505;
Bayley's Personal Injuries, Vol. 1, Sec. 463, 467, 471, 473, 537 and 578a;
Buswell on Personal Injuries, Sec. 207, 211.

Revised Statutes of Texas, Art. 4560 F: "Every corporation operating a railroad the line of which shall be situated in whole or in part in this State shall be liable for all damages sustained by any servant or employe thereof while engaged in operating the cars, locomotives or trains of such corporations, by reason of the negligence of any other servant or employe of such corporation, and the fact that such servants or employes were fellow

servants with each other shall not impair or destroy such liability."

Art. 4560 I: "No contract made between the employer and employe based upon the contingency of death or injury of the employe and limiting the liability of the employer under this chapter or fixing damages to be recovered shall be valid or binding".

Second Counter Proposition on the Point of Assumed Risk:

At the request of Plaintiff in Error the Court instructed the jury that if Behymer knew that the cars were covered with ice, then he would be held to have assumed the risk of the danger arising from such condition, although he went upon the cars by direction of the conductor; and if his injuries were caused by the condition of the cars he could not recover.

The Court correctly ingrafted upon such instruction the qualification, "and not by the negligence of those operating the cars;" for that, though Plaintiff be held to have assumed the risk arising from the icy condition of the cars and could not recover if his injuries were caused by such condition, still he could recover if his injuries were caused by negligence in handling the cars, even though the condition of the cars (which danger he assumed) contributed to his injuries.

The general charge of the Court as well as the special instruction given on this point has already been set out, page——of this brief. These charges made clear that if plaintiff was injured by reason of the icy condition of the cars, that is, if he slipped and fell on account of the ice, he could not recover. The complaint of the plaintiff in error is that the Court inserted the qualification, "and not by the negligence of those operating the cars." Taken in connection with the main charge heretofore quoted, the words inserted by the Court were intended to leave to the Jury to "determine from all the evidence what caused the plaintiff to fall." But it is a familiar rule that an employe may recover where the negligence of the master contributes to cause the injury with other causes for which the master would not be liable, as, for instance, risk assumed.

Authorities:

III

Counter-Proposition on the point of contributory negligence:

The specification of error which attacks the Court's charge on contributory negligence is based

on a misapprehension of the charge. The Court defined contributory negligence as "the doing of an act that a man of ordinary prudence and caution would not have done under the circumstances, *which contributed to his injury*, or it consists in the failure to do an act that a man of ordinary care and prudence would have done under the circumstances. It means that if the plaintiff was negligent and the defendant was negligent no recovery can be had. It means that the defendant must have been negligent and the plaintiff not negligent."

This was a correct statement of the law, and is favorable to the plaintiff in error. In the absence of a requested instruction enlarging upon the question of contributory negligence no error was committed by the Court.

The Court instructed the jury on contributory negligence as above set forth (Tr. p. 109), and gave also the following special instruction No. 5, requested by Plaintiff in Error: "You are further charged that if at the time Plaintiff fell from the top of defendant's car he knew or by the use of reasonable diligence could have known that the tops of the cars were covered with ice and that such condition was dangerous to persons walking or working on top of said cars, then he will be held to the use of such care and caution to avoid injury

to himself commensurate with said condition, and if he failed to do so and was thereby injured he would be guilty of contributory negligence, and he can not recover damages against defendant for his injuries, even though you should believe from the evidence that defendant, its agents and servants, were also guilty of negligence contributing to the accident and injury" (Tr. p. 115).

Authorities:

IV

Counter-Proposition on the point of the duty of Behymer to have his injuries healed:

All that can be required of a party who has been injured by the negligence of another is that he use reasonable care to protect himself from the consequences of such injury—to use reasonable care in the treatment of his injuries. It can never be said as matter of law that the injured party must submit to a serious surgical operation; the law is that he use reasonable care to have his injuries healed; the question of fact is, has he used such care.

The Court having fully instructed the Jury that it was Behymer's duty to use reasonable care to

have his injuries healed and to submit to reasonable surgical operation, the law of the case was fully given, and as favorably to plaintiff in error as could be demanded.

The Court in its general charge instructed as follows: "It was the duty of plaintiff to use the care that a reasonably prudent person would have used in order to have his injury healed. It was his duty to submit to all medical or surgical treatment that a reasonably prudent person would have submitted to, and, therefore, if you find for the plaintiff you are to determine whether or not he has used the care that a reasonably prudent person would have used in order to have his wounds healed. If he did use such care that is the end of it. If he failed to use such care, and you find from the evidence that by having used such care his injuries could have been cured or could have been remedied, the rule is this: If they could have been cured in toto his recovery would be limited, if otherwise entitled to recover, to the original injury, and the mental and physical suffering and loss of time up to the time his injuries should have been healed by proper care. That is the case where it is a total cure. But if you find by proper care that his injuries could not have been totally cured, but could have been ameliorated or made better, then, in estimating damages you

could only estimate damages for the original injury, the physical and mental suffering and loss of time up to the time such treatment would have partially restored it and any reasonably amount for the rest of his life, in the event you find it was permanent." (Tr. p. 108).

And in the same connection the Court instructed the jury: "If by submitting to proper surgical treatment his leg could not have been totaliy cured but could have been made much better, then in estimating the damages you base it upon an improved condition of the leg and not upon its present condition; in other words, upon the basis of the condition of the limb if proper care had been taken. As stated, if it was a total cure you can allow only for the injuries up to the time it could have been cured, and to that point only", etc (Tr. p. 108).

And the Court also gave the special instruction No. 7 requested by Plaintiff in Error: "If you believe from the evidence that after Plaintiff left the hospital at Marshall a surgical operation could have been performed or can now be performed which would or would have restored his leg to its former condition of usefulness, *and that a reasonably prudent person would have submitted himself to such operation and the treatment afterward*, then the Plaintiff would not be entitled to recover any damages of defendant beyond an amount that

would reasonably compensate him for any impairment of his leg, if any, which remain after such operation and treatment, and beyond an amount which would reasonably compensate him for loss of time and mental and physical suffering arising from the original accident as the direct result thereof, though you should find that there was negligence on the part of Defendant, its agents or servants, causing the original injury, and that plaintiff was free from contributory negligence, as defined in other parts of this charge" (Tr. p. 115).

It will be seen from this special instruction that plaintiff in error invited the Court to instruct the Jury that the measure of plaintiff's duty was that care which a reasonably prudent person would have exercised; and if there was any error in this regard, which is denied, the same was invited.

The Court also gave instruction No. 6, requested by plaintiff in error, as set out in specification of error No. 16, the Court giving the same as requested, except to ingraft upon that portion of the charge requiring Behymer to follow the directions and submit himself to the treatment of the Company's surgeons the element of Behymer's negligence in failing so to do. The plaintiff in error by this instruction and by requested instruction No. 7, *supra*, invited the Court to the proposition that it was a question whether Behymer had exer-

cised reasonable care to have his injuries healed, and cannot complain that the Court applied the same rule in reference to the duty of Behymer to submit to the directions and treatment of the Company's surgeon.

Authorities:

Rwy. Co. vs. McMannewitz, 70 Tex. 76;
Cooper vs. City of Dallas, 83 Tex. 242;

The special instruction requested by plaintiff in error and given contained the principle that plaintiff was not debarred from recovery for his full injury on account of failure to have a surgical operation performed unless, under the circumstances, his failure to do so was negligence; and Plaintiff in Error can not complain that the Court ingrafted in the other special instruction requested by it (as to the alleged failure of Behymer to follow the treatment and instructions of the Company's surgeon) the element of Behymer's negligence in so failing to do.

The Court gave the special instruction requested by plaintiff in error that plaintiff could not recover for the condition of his leg if the same was caused by improper treatment or want of attention on the part of the Company's surgeon (Special instruction No. 3, Tr. p. 12), and the Court correctly

gave in connection therewith the instruction that though the plaintiff's injuries as they then existed may have been the result of improper treatment, yet he could recover for all the injuries occasioned by the original accident and all damages that he may have suffered or may hereafter suffer as the direct and proximate result of the original accident. These instructions taken in connection with the general charge fully instructed the Jury as to Behymer's duty with reference to his injuries, that it was his duty to use reasonable care to have them healed, to submit to all reasonable medical and surgical treatment, failing in which he could only recover for the original injury and for such condition of his leg as would have remained after such treatment and operation; and that he could not recover for any inattention or mistreatment of the Company's surgeons, and only for the direct and proximate result of the original injury. The qualification given with the Company's special instruction No. 3, that plaintiff could recover for the original injury, is in almost the same language as that employed in the Company's special instruction No. 2, given by the Court.

V.

This Court will not review questions of fact, but where there was evidence tending to support the verdict it must be assumed that all the facts were

correctly found by the Jury; nor will this Court determine on writ of error whether the verdict in an action for personal injuries was excessive.

Authorities:

New York Etc. Ry. Co. vs. winter, 143 U. S. 60;

Lincoln vs. Power, 151 U. S. 436;

Chicago & N. W. R. R. Co. vs. Ohle, 117 U. S. 123;

N. W. Etc. Packet Co. vs. McCue, 17 Wallace, 508;

United States Express Co. vs. Ware, 20 Wallace, 543.

As the plaintiff in error strenuously insisted in the Circuit Court of Appeals that the verdict was against the weight of the testimony and the damages excessive, and so insists in this Court, we recite so much of the facts as will show that the verdict of the Jury was a just one and that the damages assessed were in no sense excessive.

This cause was removed from the State to the Federal tribunal, where both parties might expect a fair trial, where local prejudice, influence or sympathy would not avail either party.

No testimony was offered or introduced in evidence to which plaintiff in error objected, and none of the testimony offered by it was rejected. The trial was a quiet and orderly one and the record

does not disclose that anything occurred in any manner calculated to prejudice or inflame the Jury, and no infllamatory remarks or improper conduct on the part of Behymer's attorneys is complained of.

The testimony of all the witnesses was to the effect that Behymer was injured while in the discharge of his duty; that he was at his proper place where it was necessary for him to be; that the tops of the cars were incased in ice, that plaintiff lost his balance by reason of the rough manner in which the cars were handled and that the slippery condition of the cars prevented him from regaining it; that the engineer knew at that time that the cars were covered with ice and that it was difficult for Behymer to remain and work upon the cars in that condition, that he shut his eyes to the conditions and stopped the cars suddenly and violently by the application of the air brake; that this manner of stopping the cars was not necessary nor was the same a necessary incident to the service; that the cars could have been stopped without difficulty or effort so as to have avoided the bumping and jerking, by cutting off the steam and permitting them to stop of their own weight, going up the grade; that the engineer made no allowance for the conditions, but handled the cars as he would have done under other conditions—when the weather was

good and the cars not covered with ice. Behymer was without fault or negligence.

Behymer was a young man 23 years of age. Both bones of his leg were broken between the knee and the foot, the bones being jabbed through the flesh. The suffering which he endured was intense; his injuries seri us and permanent, rendering him a cripple. At the time of the trial, which was a year after his injuries were sustained, his leg was still broken; the bones had not united and his limb was useless. He had remained in the Company's hospital for several months For all these injuries, his physical and mental suffering, loss of time and the impairment of his physical powers and ability to work, and for the hampered situation in which he is now placed he was entitled to recover such an amount as would reasonably compensate him. The Jury which heard all the testimony and saw the witnesses found that plaintiff was entitled to recover; they saw plaintiff's injuries and heard the testimony in relation thereto, and found his damages to be ten thousand dollars; the trial judge approved the verdict of the Jury when he overruled a motion for new trial. The verdict of the Jury is amply sustained by the testimony, which calls loudly for the affirmance of the judgment, unless the Court has committed a prejudicial error in its charge which will require a reversal.

Remarks:

We will briefly review a few of the cases on the point of the risk assumed by the employe:

In Hosick vs. Rwy Co., 75 Iowa, 683, the employe was injured by the Company's negligence in loading a car with machinery without providing it with a foot board, the car being placed in the train in such position that plaintiff must pass over it in the performance of his duties. In that case the Court said: "It is claimed by appellant that the car from which plaintiff fell was loaded in the manner *usual on its road*, and that it was not customary at that time, and never had been, to place foot boards over cars so loaded; that plaintiff knew these facts before he was employed by the defendant; and that by accepting service with that knowledge he assumed all risk and hazzard growing out of the manner of loading cars without foot boards". * * * "Under the charge of the Court the jury found that the defendant was negligent in not providing a foot board for the car in question. This being true, the fact that such negligence was usual or customary would not relieve defendant from liability for its consequences. We do not think the jury would have been justified in finding from the evidence that plaintiff assumed the risk alleged by the defendant".

The Court held in that case that the question was, whether plaintiff was guilty of contributory

negligence in attempting to pass over the car, knowing the condition and the danger of the attempt, and that the same was a question for the jury. This case is authority for the proposition that the servant does not assume the risk arising from the negligence of the master, and that no custom on the part of the master could justify his negligence.

In B. & O. Rwy. Co., vs. Rowan, 104 Ind., 94; defining the risk assumed by the employe, the Court said: "He who engages in the employment of another for the performance of specified duties takes upon himself the natural and ordinary risks and perils incident to the performance of such services. But there are well defined exceptions to this general rule, one of which arises from the obligation or duty of the master not to expose the servant while conducting his business, to perils or hazzards which might have been provided against by the exercise of due care on the part of the master."

In Moran vs. Harris, 73 Iowa, 390, the employee was injured while being hoisted in a shaft with machinery operated by the master. Speaking of the risk assumed by the employe, who, it appears, was familiar with the character and condition of the machinery, the Court said: "There was one element in this case which distinguishes it from the cases cited. Plaintiff was not em-

ployed to *work with the machinery*. He was engaged in the work of excavating the shaft, and had nothing whatever to do with operating the hoisting apparatus. Defendants undertook, themselves, the work of operating the machinery and they undertook to lower and hoist plaintiff by this means when he had occasion to enter the shaft or to leave it." * * * "If it be conceded that plaintiff assumed the risk of all such dangers as were created by the defects of the machinery it does not follow that defendants would not be liable for such injuries as might be occasioned by their negligence in the operation of the machinery or such as they could have prevented by the exercise of reasonable diligence and care. All that can be claimed is that plaintiff assumed the risk of such danger as might be occasioned by the defects in the machinery while being used in a reasonably prudent and careful manner. He did not assume the risk of such dangers as would be created by the careless or negligent manner in which the defendants might use the defective machinery".

So, in the case at bar, if it be said that plaintiff assumed the risk from the condition of the cars, covered with ice, he had nothing to do with their operation nor the manner of handling them; that was done by the master though the engineer, who was under the duty to handle the cars in reasonably prudent manner. Whether the engineer acted

with reasonable care is to be determined by the circumstances of the case, the danger to Behymer and the consequences reasonably to follow a failure to exercise such care.

In the case of Ry. Co. vs. Sims, 80 Ga., 749, cited by plaintiff in error, the question was not raised as to the charge of the Court; the principles and distinction of the law are not attempted to be given, and the case seems to have been decided upon a point of fact. The facts as testified by the engineer, in that case were: "On the occasion in question the train started off reasonably slow. Witness saw plaintiff go on the engine with a big load of wood in his arms or on his shoulder, etc. When the train was waived down it was going eight or nine miles an hour. Witness used all the care he could; did not jerk the train but pulled off very slowly etc. There was no jerk, unless a very slight one. Of course when it started there was some jerk, but the throttle of the engine worked nicely and it moved off gradually and gently. * * * In moving a train when the hands are working a man can walk all that is necessary without danger, but he does so at his own risk. If a man is careful he will be safe. It was gross carelessness that plaintiff fell." The conductor of the train testified that the plaintiff was not at his proper place, that he ought to have got on the platform and sat down, that there was danger in

walking on the train and in stepping from one car to another, that the engineer did all that could have been done, and that there were rocks and jerks of the train from irregularities in the track. On these facts the Court said: "The train being in motion, there was a jerk, and in attempting to step from one car to another or when about to make the step he was thrown from the car. We think that such jerks upon a train of that character must be expected to occur and that the risk of employment embraces them. It would certainly be impracticable to keep up the repairs of a railroad upon any very strict rule in regard to jerks in the movement of construction trains."

The only other case cited by plaintiff in error to which we have access is Auglin vs. T. & P. Ry. Co., 60 Fed. Rep. 553.

The controlling facts in that case were: Plaintiff was engaged in helping to move a dead engine which had to pass another engine on an adjoining track. The poximity of the engines was as apparent to plaintiff as to the others. He thought he could pass between them; he voluntarily took a position and continued in it till he was caught between the two engines. In their opinion the Circuit Court of Appeals say: "Plaintiff was an old, experienced railroad man, perfectly familiar with the movements of engines and had frequently assisted in moving engines in the same manner as

this one was being moved. The position of each engine was seen by him before he commenced, etc. He was not commanded or directed to work at any particular place at the engine, and the position taken by him was of his own choice and with full knowledge of the fact that said engine, as it would be moved forward, would come closer to the one standing on the other track, etc". He was held to have assumed the risk of being caught between the two engines. The decision could have been rested on the lack of negligence, for the Court say: "On the facts of the case the injury to the Plaintiff was not caused by any negligence of the general foremon or the foreman of the round house".

Citation of Additional Authorities:

Rwy. Co. vs. Ross, 112 U. S. 377.
Rwy. Co. vs. Teeter, 63 Fed Rep. 527.
Rwy. Co. vs. Johnston, 61 Fed Rep 738;
Rwy. Co. vs. Charless, 51 Fed Rep. 562;
Rwy. Co. vs. Obrien, 49 Fed Rep 538:
Cheatham vs. Red River Line, 56 Fed Rep, 249;
Rwy. Co. vs. Lafferty, 57 Fed Rep. 536;
Rwy. Co. vs. Brown, 57 Fed Rsp. 807;
Chicago etc. Rwy Co. vs. Stahley, 63 Fed Rep. 363;
Southerland vs. N. P. Rwy. Co. 43 Fed Rep. 646.

Rwy. Co. vs. Frazier, 34 S. W. Rep. 664 (Tex).
Rwy. Co. vs. Eberheart, 91 Tex. 324;
Rwy. Co. vs. Doyle, 49 Tex. 190;
Brown vs, Sullivan, 71 Tex. 476.
Rwy. Co. vs. Silliphant, 70 Tex. 624;
Rwy. Co. vs. Aylward, 79 Tex. 675.

Respectfully submitted,

CONE JOHNSON,

Attorney for Defendant in Error,

ABE BEHYMER.

Supreme Court of the United States.

No. 224.—October Term, 1902.

The Texas and Pacific Railway Company, Plaintiff in Error, vs. Abe Behymer. } In error to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 20, 1903.]

The opinion of the Court was delivered by Mr. Justice Holmes.

This is an action for personal injuries brought by an employee against a railroad company. It was tried in the Circuit Court, where the plaintiff had a verdict. It then was taken to the Circuit Court of Appeals on a writ of error and bill of exceptions by the company, and now is brought here on a further writ of error, the company being a United States corporation. A good deal of the argument for the railroad is devoted to disputing the testimony of the plaintiff below and arguing that the verdict was excessive, but of course we have nothing to do with that. *New York, Lake Erie & Western Railroad* v. *Winter*, 143 U. S. 60, 75; *Lincoln* v. *Power*, 151 U. S. 436. We must assume the most favorable statement of the plaintiff's case to be true, unless some particular request for instructions makes it necessary to deal with conflicting evidence. That statement may be made in a few words.

Behymer had been in the employ of the company as a brakeman about three months. On February 7, 1899, at Big Sandy, in Texas, he was ordered by the conductor of a local freight train to get up on some cars standing on a siding and let off the brakes, so that the engine might move them to the main track and add them to the train. The tops of the cars were covered with ice, as all concerned knew. He obeyed orders; the engine picked up the cars, moved to the main track and stopped suddenly. The cars ran forward to the extent of the slack and back again, as they were moving up hill. The jerk upset Behymer's balance, the bottom of his trousers caught in a projecting nail in the running board and he was thrown between the cars. It is true that the jury might have drawn a different conclusion from his evidence or have disbelieved it in essential points, but they also were at liberty to find, as they must be taken to have found, that the foregoing statement is true. The car belonged to another road but was in the charge of the defendant company, and, according to the statement of the counsel for the plaintiff in error, had been inspected before

the accident, although we should have doubted whether the testimony meant to go so far. Behymer based his claim upon negligence in stopping the cars so suddenly with knowledge of his position and the slippery condition of the roof of the car, and upon the projection of the nail, which increased the danger and contributed to his fall. It should be added that by a statute of Texas if there was negligence the fact that it was the negligence of a fellow servant was not a defense. General Laws, Texas, 1897, Special Session, c. 6, § 1; 2 Sayles, Texas Civil Stat. 1897, Art. 4560 f.

The fundamental error alleged in the exceptions to the charge is that the court declined to rule that the chance of such an accident as happened was one of the risks that the plaintiff assumed, or that the question whether the defendant was liable for it depended on whether the freight train was handled in the usual and ordinary way. Instead of that, the court left it to the jury to say whether the train was handled with ordinary care, that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not. *Wabash Railway Co.* v. *McDaniels*, 107 U. S. 454. No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet it can be avoided if necessary, and when the particular and known condition of the train makes a sudden bump obviously dangerous to those known to be on top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty. If it was negligent to stop as the train did stop, the risk of it was not assumed by the plaintiff. *Texas & Pacific Ry.* v. *Archibald*, 170 U. S. 665, 672.

However, the plaintiff did not rely on the management of the train alone. The projecting nail was another element in his case. The jury were instructed with regard to that, that the railroad company was not liable unless there was a nail there improperly projecting, and a reasonable inspection would have discovered and remedied the defect. The car was in the custody of the company. There is no suggestion that the company had not had an opportunity to inspect, and the contrary was assumed by a request for instructions on the part of the company. Indeed, as we have said, its counsel interprets the evidence as meaning that the car had been inspected before the accident. It is not pressed that there was error on this point. See *Mackin* v. *Boston & Albany Railroad*, 135 Mass. 201; *Glynn* v. *Central Railroad*, 175 Mass. 510, 512. The jury were instructed properly on the subject of assumption of risks and contributory negligence, and we think it unnecessary to deal more specifically with this part of the case.

It was argued that Behymer had aggravated the injury by refusing proper surgical treatment. With regard to this the jury were instructed in substance, but at more length, that it was his duty to submit to all treatment that a reasonably prudent person would have submitted to in order to improve his condition, and that no damages could be allowed which might have been prevented by reasonable care. It is suggested that, as a prudent man, he might have postponed recovery from his injury to recovery of damages. The instructions plainly excluded such a view. The argument hardly is serious. We have examined all the minute criticisms on the rulings and refusals to rule, and discover no error. We deem it unnecessary to answer them in greater detail.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.